# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1916.

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No. 797.

FRANCIS M. WILSON, UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF MISSOURI, APPELLANT,

vs.

ALEXANDER NEW AND HENRY C. FERRIS, AS RECEIVERS OF THE MISSOURI, OKLAHOMA & GULF RAILWAY COMPANY.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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1 United States of America, Sct.

Be it remembered that heretofore, to wit, at the regular November term of the District Court of the United States for the Western Division of the Western District of Missouri, and on the 20th day of November, 1916, a bill of complaint was filed in the office of the clerk of the District Court of the United States for the Western Division of the Western District of Missouri, in the case wherein Alexander New and Henry C. Ferris, as receivers of the railroad and property of Missouri, Oklahoma & Gulf Railway Company, are plaintiffs and Francis M. Wilson, United States district attorney, E. C. Gray, B. C. Montpleasure, R. R. Stephens, and J. C. Morrow are defendants.

Said bill of complaint, filed November 20, 1916, is in words and figures as follows, to wit:

2 In the District Court of the United States for the Western District of Missouri, Western Division.

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| ALEXANDER NEW AND HENRY C. FERRIS, AS RECEIVERS of the railroad and property of Missouri, Oklahoma & Gulf Railway Company, complainants, vs. FRANCIS M. WILSON, UNITED STATES DISTRICT attorney, E. C. Gray, B. C. Montpleasure, R. R. Stephens, and J. C. Morrow, defendants. | In equity, No. 133. |

*To the honorable the judge of the District Court of the United States for the Western District of Missouri:*

Complainants Alexander New and Henry C. Ferris, as receivers of the railroad and property of Missouri, Oklahoma & Gulf Railway Company, bring this their bill of complaint against Francis M. Wilson, a resident of the city of Kansas City, Jackson County, Missouri, duly appointed, qualified, and acting district attorney of the United States for the Western District of Missouri, and E. C. Gray, B. C. Montpleasure, R. R. Stephens, and J. C. Morrow, and thereupon complain and respectfully represent and allege as follows:

1. Complainants Alexander New and Henry C. Ferris are the duly appointed, qualified, and acting receivers of Missouri, Oklahoma & Gulf Railway Company, a corporation existing under the laws of the State of Oklahoma, the complainants having been appointed as such receivers in a suit pending in the District Court of the United States for the Eastern District of Oklahoma, as the court of principal or primary jurisdiction, and under and by virtue of certain confirmatory orders duly entered in the United States District Courts for the Western District of Missouri, Southwestern Division, at Joplin, and in the District of Kansas, Third Division,

and as such receivers, complainants acting under the orders of said courts are in the possession and operating the railroad and
3 property of Missouri, Oklahoma & Gulf Railway Company, and as such are duly authorized to maintain this suit.

2. That defendant Francis M. Wilson is the duly appointed, qualified, and acting United States district attorney for the Western District of Missouri, and is a citizen and resident of the State of Missouri and of the Western Division of the Western District of Missouri; E. C. Gray is local chairman of the division lodge of the organization known as the Brotherhood of Locomotive Engineers, and that he is an engineer in the employ of complainants and represents the interests of locomotive engineers in their employ in respect to matters involved in this suit; that B. C. Montpleasure is local chairman of the division lodge of the organization known as the Order of Railway Conductors, that he is a railway conductor in the employ of complainants and represents the interests of the conductors in their employ in respect to matters involved in this suit; that R. R. Stephens is local chairman of the division lodge of the organization known as the Brotherhood of Locomotive Firemen and Enginemen, and is an employe of complainants, and represents the interests of the locomotive firemen and enginemen in their employ in respect to matters involved in this suit; that J. C. Morrow is local chairman of the division lodge of the organization known as the Brotherhood of Railroad Trainmen, that he is in the employ of complainants and represents the interests of the railroad trainmen in their employ, including train brakemen and flagmen; that said defendant employes represent the interests of the employes of these complainants actually engaged in any capacity in the operation of trains used for the transportation of persons or property.

3. That this is a suit or controversy arising under the Constitution and laws of the United States, and that the amount involved greatly exceeds the sum or value, exclusive of interest and costs, of five thousand ($5,000.00) dollars; that a compliance with the act of Congress, which act is hereinafter set forth and alleged to be invalid, entitled "An act to establish an eight-hour day for
4 employes of carriers engaged in interstate and foreign commerce, and for other purposes," and relating to the compensation of employes engaged in the operation of trains used for the interstate transportation of persons or property, would, if the enforcement thereof be not enjoined, as herein prayed, entail upon complainants a loss and damage greatly in excess of the above amount, as hereinafter shown, while a failure to comply with such act on its part would entail numerous prosecutions and possible imposition of penalties and expenses greatly in excess of the above amount.

4. Missouri, Oklahoma & Gulf Railway Company, of which Alexander New and Henry C. Ferris, complainants herein, are the duly appointed, qualified, and acting receivers, for some years past has been a common carrier by railroad and subject to the provisions

of the act of Congress of February 4, 1887, entitled "An act to regulate commerce," as amended, and as such common carrier is, and for some years past has been, engaged in the operation of lines of railroad owned, leased, or controlled by it in the transportation of persons and property, which lines extend from the Red River, in the southern part of Bryan County, Oklahoma, through the State of Oklahoma and through a portion of the State of Kansas, and a portion of the State of Missouri to and within the city of Joplin, Missouri, together with various branches and connections with its said lines in the aforesaid States.

Upon all of their lines and divisions thereof complainants operate, through their employes, to wit, conductors, brakemen, engineers, and firemen, and in some instances other employes, their trains in the transportation of persons and property, and all of their trains so operated are engaged in carrying on interstate commerce or transportation; complainants have in their employ engaged in such operation of their trains in road service, approximately—

60 engineers.
60 firemen.
50 conductors.
100 brakemen and flagmen.

270

5 Substantially all of complainants' employes in their train service are members of associations or labor unions or organizations, as follows:

The engineers are members of the Brotherhood of Locomotive Engineers and in some instances of the Brotherhood of Locomotive Firemen and Enginemen; the firemen are members of the Brotherhood of Locomotive Firemen and Enginemen; the conductors are members of the Order of Railway Conductors and in some instances of the Brotherhood of Railroad Trainmen; the brakemen and flagmen are members of the Brotherhood of Railroad Trainmen.

Complainants say that said employes have a common interest with the defendants hereto in this litigation, but are too numerous to be made parties hereto, and that their interests and rights are fairly represented and will be amply protected by said defendants.

5. By various agreements entered into prior to March 29th, 1916, between said complainants and said respective organizations of train operatives, the rates and bases of compensation of said train operatives, and other rules and conditions of their employment, were agreed upon, and such rates, bases, rules, and conditions are still being observed and applied by the respective parties and by the complainants herein as receivers of Missouri, Oklahoma & Gulf Railway Company.

Complainants say that none of said agreements contemplate that an employe shall work a fixed number of hours per day; that all

of said agreements contemplate, and the peculiarities of railroad train service necessitate, that employes engaged in the operation of a train shall remain on duty until the train reaches the terminal where such train employes reside or can be accommodated with lodging between trips, where the incoming employes can be relieved and replaced by other employes, where there are tracks
6 upon which the train can, without blocking the main tracks, remain while the transfer of crews is taking place, and where there are shops, houses, turntables, and tracks for the care of locomotives, so as to relieve the incoming locomotive for cleaning and repair, and so as to replace it with another locomotive which has been prepared for hauling the train beyond that terminal. In other words, complainants say that said employes are and must be required to perform the piece of work assigned to them; that is, to accompany their train until it reaches the end of the run to which they are assigned, so that their work is measured primarily by mileage and not by hours. Complainants further say that, except in local passenger and freight service and work-train service, employes who operate trains do not necessarily work every working day, but, on the contrary, frequently have lay-overs, sometimes regular and sometimes irregular, of a day or more between trips.

Complainants state that said agreements provide many different measures, standards, and rules for reckoning and affecting the compensation for the pieces of work performed by said employes, and that in any one agreement the various measures, standards, and rules therein used are related to each other and each constitutes in part the consideration for the others.

Complainants state that in many of said agreements the primary basis of compensation is mileage; that in some of the agreements where the primary basis of compensation is mileage the employe is paid a fixed rate for the first 100 miles or less, and pro rata for additional mileage, and there is a provision as to hours of service which is designed to insure that the employe shall receive additional pay if his trip is 100 miles or less and requires more than 10
7 hours, or if his trip is more than 100 miles and is made at an average speed of less than 10 miles per hour; for example, if a trip of 130 miles requires more than 13 hours, the employe, in addition to his mileage, is paid for the time in excess of 13 hours, and in such a contract any overtime is paid for at the rate of 10 miles pay for each hour of overtime.

Complainants state that in other contracts based upon mileage there is no provision whatever for pay by time or by hours, except in cases where the run is not made at required average speed, in which event overtime is paid for the time in excess of what would have been required if the run had been made at the required speed basis in computing overtime; for instance, in the case of passenger trainmen, when the run is not made at an average speed of 15 miles per hour.

Complainants state that whatever the method of reckoning the compensation, the thing paid for is the piece work, to wit, the trip.

Complainants state that in nearly all of their freight train service and in a large part of its passenger-train service the piece of work paid for is a trip exceeding 100 miles in length; that in many cases in freight train service such trips are made at an average speed of not exceeding 10 miles per hour, and that even where such trips are made at a higher average speed, the length of the trip is frequently such as to require considerably more time than 8 hours to make the trip; and that consequently in passenger train service considerably more than 8 hours are required to make the trip.

Complainants state that whatever the primary basis of compensation in any one of said agreements may be, there are coupled with it various supplementary measures and standards of reckoning compensation, such as those relating to delays at terminals, incidental switching, loading and unloading live stock, and loading and unloading material, being detained between trips at a terminal other than the home terminal of the employe beyond the specified periods, and being tied up at a point between terminals. Some of the contracts, in determining whether, and if so, how much, overtime has accrued (that is, time in excess of what would have been required if
8 the contract average speed had been maintained), provide that the time shall be from the time the train is ordered to depart from the initial terminal, rather than the time (frequently thirty minutes earlier) when the employe is required to report for duty.

That on or about the said 29th day of March, 1916, said organizations or associations of railway employes, by their respective officers, joined in a request in writing upon complainants to revise the then existing agreements between complainants and said associations or organizations, with reference to the standards or measures for reckoning the compensation for services of said employes engaged in operating trains. Said request was embodied in Article I of said proposition designated as No. 35, and was subject to the qualifications contained in Article IV of said proposition.

Articles I and IV of said proposition here follow:

"Article I. (a) In all road service 100 miles or less, eight hours or less, will constitute a day, except in passenger service. Miles in excess of 100 will be paid for at the same rate per mile.

"(b) On runs of over 100 miles or less overtime will begin at the expiration of eight hours.

"(c) On runs of over 100 miles overtime shall begin when the time on duty exceeds the miles run divided by 12½ miles per hour.

"(d) All overtime to be computed on the minute basis and paid for at time and one-half times the pro rata rate.

"(e) No one shall receive less for eight hours or 100 miles than they now receive for a minimum day or 100 miles for the class of engine used or for service performed.

"(f) Time will be computed continuously from time required for duty until release from duty and responsibility at end of day or run.

"Article 4. Any rates of pay, including excess mileage or arbitrary differentials that are higher, or any rules or conditions of employment contained in individual schedules in effect January 1, 1916, that are more favorable to the employes, shall not be modified or affected by any settlement reached in connection with these proposals. The general committee representing the employes on each railroad will determine which is preferable and advise the officers of their company. Nothing in the settlement that may be reached on the above submitted articles is to be construed to deprive the employes on any railroad from retaining their present rules and accepting any rates than may be agreed upon or retaining their present rates and accepting any rules that may be agreed upon."

Article 2 of said proposition relates to yard and switching service, and article 3 of said proposition relates to hostling service. But since said articles do not relate to the service of operating trains it is not appropriate to quote them in this connection. A copy of said proposition No. 35 is hereto attached as Exhibit "A."

The demands contained in article 1 of said proposition No. 35 relating to all road service except passenger service would, if granted, have resulted in a very material increase in the compensation of the employes engaged in the operation of trains.

Complainant and other railway companies submitted a counter proposition, demanding a revision of the existing arrangement in several respects, and proposed that the matters in dispute be submitted to arbitration, either to the Interstate Commerce Commission or under the act of Congress entitled "An act to provide for mediation, conciliation, and arbitration in controversies between certain employers and employes," approved July 15, 1913, commonly known as the Newlands Act.

The leaders of said organizations refused to submit their demand to arbitration, and on the day of August, 1916, it became known to complainant, to other railroad companies, and to the general public that said organizations had ordered all of their members to strike at 7.00 a. m. Monday, September 4, 1916. Thereupon, upon the 29th day of August, 1916, the President of the United States made an address to Congress in respect to said strike, a copy of which address is hereto attached as part hereof, marked Exhibit "B"; that on the 1st day of September, 1916, a bill, in the language of the act hereafter set out, was passed by the House of Representatives, and on the 2d day of September, 1916, said bill was passed by the Senate of the United States, and said bill was approved by the President of the United States on September 3, 1916, and again on September 5, 1916, which act is as follows:

An act to establish an eight-hour day for employes of carriers engaged in interstate and foreign commerce, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the act of February fourth, eighteen hundred and eighty-seven, entitled "An act to regulate commerce," as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, from any State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States: *Provided*, That the above exceptions shall not apply to railroads though less than one hundred miles in length whose principal business is leasing or furnishing terminal or transfer facilities to other railroads or are themselves engaged in transfers of freight between railroads or between railroads and industrial plants.

SEC. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; that each member of the commission created under the provisions of this act shall receive such compensation as may be fixed by the President. That the sum of $25,000.00, or so much thereof as may be necessary, be, and hereby is, appropriated, out of any money in the United States Treasury not otherwise appropriated, for the necessary and proper expenses incurred in connection with the work of such commission, including salaries, per diem, traveling expenses of members and employees, and rent, furniture, office fixtures and supplies, books, salaries, and other necessary expenses, the same to be approved by the chairman of said commission and audited by the proper accounting officers of the Treasury.

SEC. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata for such standard eight-hour workday.

11 SEC. 4. That any person violating any provision of this act shall be guilty of a misdemeanor, and upon conviction shall be fined not less than $100.00 and not more than $1,000, or imprisoned not to exceed one year, or both.

Approved, September 3, 1916.

Approved, September 5, 1916.

By reason of the passage of said act and of assurances that the same would be approved by the President, on September 3rd said strike was called off by orders issued by the officers of said brotherhoods on the evening of September 2, 1916.

6. Complainants say that said act, if valid, would increase the wages paid by this company to many of its employees to the extent of many thousands of dollars during the period prescribed by section 3 of said act (but how much it is impossible to state, because it is impossible to know what section 3 means), and would seriously hamper these complainants in framing contracts with its employes in train service. But complainants say that said act is unconstitutional and void for the following reasons:

Said act is not a regulation of commerce among the States or with foreign nations and is not a means reasonably or appropriately related to any regulation of such commerce.

Said act does not constitute a legislative judgment that the things required by section 3 thereof are proper, but on its face shows that it merely creates a temporary and experimental status for the purpose of enabling Congress and the President to observe, at the expense of these complainants and other railroad companies, the effect of the experiment, so as to decide in the future whether any such requirements (if constitutional) are proper or not.

Said act unreasonably and arbitrarily deprives these complainants of their liberty of contract, and thereby, as well as by compelling these complainants to pay increased wages, deprives these complainants of their liberty and property without due process of law.

Said act is incapable of application to the subject matter with which it deals, and is therefore unworkable, and, while imposing enormous penalties for its violation, supplies no rules or standards whereby these complainants can know how to comply with

12 the act; so that complainants, though acting in the utmost good faith, would be subjected in any effort to comply with the statute to destructive penalties; and by reason of such unworkability and uncertainty said act is not an appropriate exercise of any power possessed by Congress and is not due process of law.

The *the* classification of railroads made in said act and the exemption from the operation thereof of certain designated railroads is unjust, unreasonable, and arbitrary, and deprives complainants of their property and rights without due process of law; that said act unduly, unjustly, and arbitrarily favors certain railway employes who now receive high rates of pay for their services, and seeks to compel these complainants to discriminate unjustly and arbitrarily in favor of those employes and against many others who have no less right to equal treatment.

Said penal clause was enacted and made drastic so as to force compliance with said act through fear of the penalties and punishment therein prescribed, and to prevent an orderly resort to the courts for a just determination of the rights of the complainants and said penal clause, as well as the other provisions of said act, are violate of and contrary to the provisions of the fifth amendment to the Constitution of the United States.

13 VII.

That the court may understand more clearly the extent to which said act operates to interfere with these complainants' liberty of contract and hamper them in the performance of their public obligations and to deprive them of their property, the reasons why said statute is incapable of application to the subject matter, and the entire absence of any legal standard whereby complainants could regulate their conduct in an effort to comply with said act and avoid the penalties, complainants state the following relative to the present standards and measures for reckoning compensation of its employes in train service and to the rules and conditions affecting their employment.

*Rates and conditions of pay of conductors and brakemen, through and irregular freight service.*

Complainants state that at present and at the date of the passage and approval of said act of Congress, and prior thereto, the schedule observed and which had theretofore been agreed upon, as heretofore stated, for labor and service of their employees who are engaged as conductors and brakemen in the operation of their "through irregular freight trains" (which constitutes much more than half of the freight-train service of these complainants) is and was substantially to the following effect, to-wit:

Said conductors and brakemen are to be paid on a mileage basis at the following rates per mile:

| | |
|---|---|
| Conductors, per mile | 4.18 cents. |
| Brakemen, per mile | 2.78 cents. |

If a run is less than 100 miles, said employes are paid for 100 miles, and if a run of 100 miles, or less, requires more than ten hours,

said employes are paid overtime for the time in excess of ten hours, it being the principle of the contract that the employes are
14 obligated to work as long as ten hours, if necessary, for the purpose of making a run of 100 miles, or less, and for such ten hours they are to receive 100 miles' pay.

If, as is generally the case, a run exceeds 100 miles, and if such run is not made at an average speed of ten miles per hour, said employees will be paid overtime for the time in excess of what would have been required if the run had been made at an average speed of ten miles per hour.

All overtime is computed on the principle that each hour of overtime entitles such employe to pay for 10 miles. Overtime is computed on the minute basis; that is, fractions of an hour (in excess of five minutes) are counted.

Where a run exceeds 100 miles and where the crew has been detained at terminal, terminal detention is allowed on the minute basis. If switching is required at terminal before departure or after arrival, terminal switching is allowed on the minute basis regardless of the miles run or time consumed in making the trip. Crews of such through and irregular freight trains required to perform service en route not incidental to the work required on such trains—for instance, unloading material, placing coal on coal chutes, or doing station switching—receive local rates for the entire trip, local rates being the highest rates paid for any class of freight service.

Crews that are assigned to circus trains which stop on the district to exhibit are guaranteed a minimum of 150 miles for each move of the train, and perform any work necessary to such train. When such crews are held over Sunday at any point they are paid 100 miles for the lay-over. This rule does not apply when a continuous run is made between district terminals, in which case the crew receives regular through freight rates.

15 Complainants say that the present unit for the purpose of reckoning compensation of said above-mentioned employes is 100 miles, and the provision as to 10 hours per day is designed to insure that the employe shall receive additional pay if a trip of less than 100 miles requires more than said hours, or if a trip of 100 miles or more is made at an average speed of less than 10 miles per hour; and that such were the facts on September 3rd and September 5th, 1916, and that the rates of pay of said employes per 100 miles were on said last-named dates, and are now, as follows, to wit:

| | |
|---|---|
| Conductors | $4.18 |
| Brakemen | 2.78 |

Complainants say that the total compensation actually received by said employes per trip is substantially in excess of said rates per 100 miles because, generally speaking, the trips exceed 100 miles, and there is provided in the schedules the intent that such employes shall make an average of 3,000 miles per month, and generally they make

in excess of such mileage; for all of which mileage said employes are paid pro rata on the basis of the above rates for 100 miles; and said employes also receive extra pay pro rata for overtime if they do not average 10 miles per hour; and said employes also receive extra pay in addition to their mileage pay by reason of the various allowances for work and delay herein set forth.

Complainants further say that the nature of the "through and irregular freight service" is such that regular and fixed hours of service are not practicable; that complainants, by virtue of their obligation as a common carrier, have to move freight when and as the same is offered, and that the only practicable way of moving freight expeditiously and economically is to make up and dispatch trains as fast as the necessary amount of freight to constitute a trainload can be received and assembled; that the result is that it is necessary to dispatch trains from terminals whenever trainloads are available; that the conductors and brakemen in such service have irregu-
16 lar layovers and their compensation for any day's service is irregular and dependent upon the service performed and varies from day to day.

*Passenger service.*

Complainants state that their employes who are engaged as conductors and brakemen in the operation of passenger trains are paid monthly salaries or wages, as follows:

On runs of 4,000 miles or less per month—conductors, $134.20; brakemen, $68.75.

On runs of over 4,000 miles and not exceeding 6,000 miles per month—conductors, $165.00; brakemen, $81.05.

Complainants state that the compensation for said conductors and brakemen is reckoned exclusively upon the mileage basis, with the exception that if their runs are made at an average speed of less than 15 miles per hour (and such average speed is substantially exceeded, except in cases of wrecks and other extraordinary delays), said conductors and brakemen are paid overtime for the time required in excess of what would have been required if the run had been made at the average rate of 15 miles per hour, such overtime rates being forty cents (40c.) per hour for conductors and twenty-five cents (25c.) per hour for brakemen.

Complainants state, therefore, at the present time there is no standard of pay in the passenger service with reference to conductors and brakemen and no present wage for present standard today and the same was true on September 3rd and 5th, 1916.

17 *Work-train service.*

In work-train service the unit rate for conductors and brakemen is as follows:

| | |
|---|---|
| Conductors | 4.38 cents. |
| Brakemen | 2.92 cents. |

One hundred miles or less, ten hours or less, constitute the unit rate, and overtime is allowed on the same basis as above explained with reference to other classes of freight service.

*Rates and conditions of pay of engineers and firemen.*

Complainants state that their present rates of pay and those observed on September 3rd and 5th, 1916, for labor and service of their employes who were engaged as locomotive engineers and firemen in the operation of their freight and passenger trains, are shown upon the exhibits hereto attached and made a part hereof, and numbered Exhibit No. 1 as to engineers and Exhibit No. 2 as to firemen.

If a run is less than 100 miles, said employes are paid the rate for 100 miles; if a run of 100 miles or less requires more than 10 hours, said employes are paid overtime pro rata for the time in excess of ten hours.

If (as is generally the case) a run exceeds 100 miles, the employes are paid pro rata for the excess mileage, and if such run is not made at the average speed of ten miles per hour said employes will be paid overtime for the time in excess of what would have been required if the run had been made at the average speed of ten miles per hour.

Complainants state that the present unit, for the purpose of reckoning compensation of said employes, is 100 miles, and that such were the facts on September 3rd and September 5th, 1916, and
18 that the rates of pay of said employees for 100 miles are the rates shown in the exhibits hereto attached, varying as set forth therein according to the class of engine.

Complainants state that the total compensation actually received by said employes is substantially in excess of said rates of pay, because, generally speaking, the run made by them is substantially in excess of 100 miles per day, for all of which excess mileage said employes are paid pro rata on the basis of the rates shown in exhibits hereto attached for 100 miles, and said employes also receive extra, pro rata, for overtime, if they do not average ten miles per hour, and said employes also receive extra pay in addition to their mileage by reason of the various allowances for work and delay hereinabove set forth.

Complainants state that the rates mentioned for freight service, as set forth in exhibits hereto attached, apply to all pusher or helper service and to all work-train service, according to the class of engine, and that engineers or firemen regularly assigned to pusher or helper service are to be paid upon the prescribed basis for each day, even though they are not called for service on those days, and that engineers and firemen regularly assigned to work trains are to be paid upon the prescribed basis for every working day.

Complainants state that when an engineer or fireman is called for service and leaves his place of residence and for any reason, except his own request, does not go out on his run, such engineer or fireman

will be allowed pay for 50 miles and stand first out, and if held on duty more than five hours and not used he will receive pay for 100 miles and stand last out.

In determining whether an engineer or fireman in all classes of service are entitled to overtime, that time shall be computed from the time that they are required to report for duty.

19 Complainants state that their present contract for labor and service for their employes who are engaged as locomotive engineers and firemen in the operation of passenger trains is substantially as follows, to wit:

The standard for measuring the compensation of engineers and firemen in such service is:

| | |
|---|---|
| 100 miles, or less | 4.40 cents. |
| Miles per hour, basis | .18 |
| Overtime per hour | .44 cents, |

as is set forth in said Exhibits 1 and 2.

## VIII.

Complainants state that the subject matter with which said act undertakes to deal is one in which compensation for service is in nearly every case reckoned primarily upon piecework basis, yet section one of said act attempts to substitute as the primary, and indeed the exclusive, basis a period of time, to wit, eight hours.

Complainants state that the changes which said act purported to make in the standards and measures of reckoning compensation for service of said employes and in the wages of said employes differed radically from the demands contained in said proposition No. 35, in the following particulars, to wit:

Said act did not purport to demand any change in respect to such matters in yard and switching service, or in hostler service, but was confined solely to service in the operation of trains. Said act did not provide, as was demanded by article 4 of said proposition No. 35, for the retention of any rates of pay or rules or conditions of employment more favorable to the employes than the standards or measures of reckoning compensation attempted to be enacted by said act.

Said act purported to apply to requirements to passenger
20 service as fully as to all other sorts of road service, whereas article one of said proposition No. 35 wholly excluded passenger service from the demands there made.

Said act did not provide, as did said article one, for the retention, in cases where it now exists, or for the establishment, where it does not now exist, of the mileage unit of 100 miles, or less, as the measure or standard of reckoning compensation, but, on the contrary, said act provided a standard of an eight-hour work day as the only measure or standard for reckoning compensation. Said proposition No. 35 contemplated that, with respect to runs exceeding 100

miles, no overtime should begin, unless the time on duty should exceed the miles run divided by twelve and one-half miles per hour. For example, according to said proposition No. 35, overtime upon a run of 150 miles was not to begin until after the expiration of twelve hours. But said act attempted to provide for a standard an eight-hour work day and for overtime thereafter, in respect to runs exceeding 100 miles, and said act made no provision whatever for the maintenance of any average speed per hour, and made no provision of any sort respecting the retention of the mileage measure or standard of reckoning compensation in any particular. Said act did not provide, and did not purport to provide, as was provided in article one of said proposition No. 35, that no employe should receive less than 100 miles than he now receives for 100 miles.

Complainants further state that by reason of the fact that none of their train service is, or can be, operated upon the basis of a fixed day's labor, and that the wages paid vary according to numerous conditions, which change from day to day, there is no such thing as a "standard day wage" in railroad service.

Complainants, therefore, state that said act is incapable of application to the subject matter, but is not workable, and that it
21 fails to prescribe any standard whereby complainants and other railroad companies can be guided.

## IX.

Complainants state that the wages of said employes are and have been substantial, and in many instances high, and that said wages are now higher than they have ever been before; that said wages vary greatly as to the different classes of employment and as to employes in the same class, and that the rates of wages on one railroad differ, in a great many particulars, from the rates of wages on other railroads of said employes performing similar services.

That section 3 of said act, if capable of application, is a merely arbitrary increase in wages, without reference to the question of whether existing wages are high or low, and with respect to any train crew, giving the greatest increase to the employe who now enjoys the highest wages and the lowest increase to the employe now receiving the lowest wages.

If said section 3 can be given practical effect, the result will be, in a large part of these complainants' train service, to compel the complainants, in respect to all runs which require more than eight hours, to pay for the portion of any such runs made in the first eight hours thereof, at an amount of wages substantially greater than the complainants are required by the agreements with their employes to pay for such portion of such runs, and to pay for the remaining portion of such runs additional compensation, which complainants are not required to pay by such agreements, and complainants believe the result will be to increase very many thousand dollars the amount which complainants will have to pay to their said employes for such service.

## X.

Complainants further state that it is the duty of said district attorney of the United States, defendant herein, to prosecute all
22 violations of the laws of the United States, unless restrained from so doing; that he will claim that said act relates to and covers wages of all employes who are now, or hereafter may be, actually engaged in the operation of trains of these complainants, used for the transportation of persons or property, and will prosecute these complainants, their officers, agents, and servants in all cases where they shall fail to adopt as the measure and standard, for the purpose of reckoning compensation of said employes, eight hours as a day's work, and unless said United States district attorney be enjoined and restrained, as hereinafter prayed, he will institute against complainants and their officers and agents having charge of the fixing and payment of the compensation of their employes actually engaged in the operation of their trains, innumerable prosecutions for penalties and imprisonment for alleged failure to comply with said act, and that complainants and their said officers and agents will be greatly harassed and impeded thereby in the proper conduct or carrying on of their business; and that unless said other defendants, representatives of complainants' employes, as aforesaid, engaged in the operation of their trains, be enjoined, numerous suits will be instituted against complainants by such employes to recover alleged extra compensation to which they will claim they are entitled by virtue of the provisions of section 3 of said act. And complainants pray that they may from time to time make as additional defendants to this bill any other of their employes or representatives thereof who may institute, or attempt to institute, suits to recover extra compensation under or by virtue of the provision of said act.

Complainants further state that they are without adequate remedy at law in the premises, and that only in a suit of this nature and by the injunctive processes of this court can they be fully protected in the exercise of their rights; that the granting of the injunctive processes, as hereinafter prayed for, will prevent a multiplicity of
23 suits and prosecutions, and the questions herein involved can only be adequately determined in a suit of this nature.

## XI.

For as much, therefore, as your complainants are without remedy, save in a court of equity, and to the end that the said Francis M. Wilson, a resident of Kansas City, Missouri, duly appointed, qualified, and acting district attorney of the United States for said western district of Missouri; and E. C. Gray, chairman of the Brotherhood of Locomotive Engineers; B. C. Montpleasure, chairman of the Order of Railway Conductors; R. R. Stephens, chairman of the Brotherhood of Locomotive Engineers and Firemen; and J. W. Morrow,

chairman of the Brotherhood of Trainmen; and each of them, and all persons who may hereafter be made parties defendent hereto, shall be required to make full, complete, and direct answer thereto, but not under oath, the answer under oath being hereby waived, complainants pray that the defendants, and each of them, and each and all of their attorneys, servants, agents, associates, and employes, and all employes in complainants' service, who may be represented by them, may be enjoined and restrained preliminarily, until final hearing, and perpetually thereafter, from, and in any manner, instituting or authorizing, or directing to be instituted any prosecution or proceeding, or any suit or action, under or arising or growing out of the aforesaid act of Congress, or for the purpose of enforcing any alleged right thereunder, and complainants pray that the aforesaid act of Congress, and particularly sections one, three, and four thereof, be adjudged to be unconstitutional and void, as hereinbefore claimed, and to be held for naught, and that complainants, their officers and agents, be not required to observe or to comply with the same or the provisions thereof.

24 May it please your honor to grant unto these complainants not only a writ of injunction conformable to the prayer, but also a writ of subpœna of the United States of America, directed to the said defendants, Francis M. Wilson, a resident of Kansas City, Missouri, the duly appointed, qualified, and acting district attorney of the United States for said western district of Missouri; and E. C. Gray, chairman of the Brotherhood of Locomotive Engineers; B. C. Montpleasure, chairman of the Order of Railway Conductors; R. R. Stephens, chairman of the Brotherhood of Locomotive Engineers and Firemen; and J. W. Morrow, chairman of the Brotherhood of Trainmen, commanding them, on a day certain, to appear and answer this bill of complaint, but not under oath, and to abide by and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

And, furthermore, that a temporary restraining order, as provided by law, may be issued restraining said defendants, and each of them, their associates and agents, in accordance with the prayer for a preliminary and perpetual injunction; that said temporary restraining order may be served immediately upon each of said defendants named, and that it may be ordered and decreed by this court that said temporary restraining order shall become effective and binding upon the defendants unknown and unnamed from the time such defendants shall have received actual notice of such restraining order; that the marshal of this court be directed immediately to publish such temporary restraining order in one or more public newspapers, to be designated in the order of this court, published on the line of said railroad operated by complainants, and that the marshal shall be further directed to post copies of said restraining order and said injunction.

25 Complainants state that they are willing, pending the court's final determination as to the validity of said act, to take such

steps as may be approved by the court for the purpose of preventing any employe from suffering loss by reason of the temporary injunction herein prayed for, and to that end complainants pray the court to indicate what steps they shall take by way of keeping special accounts, giving bond, or otherwise, for the purpose of securing complete protection to all of their employes. On the other hand, complainants state that if a preliminary and final injunction be denied, and these complainants be compelled, under fear of the penalties provided in said act, to adopt, at their peril, some construction of the act involving the payment of increased wages to a considerable number of their employes in train service, and if the act shall subsequently be declared to be invalid the loss thereby sustained by these complainants can never be repaired in any way, but will be wholly irreparable.

ALEXANDER NEW and
HENRY C. FERRIS,
*As receivers of the railroad and property of Missouri, Oklahoma & Gulf Railway Company,*
By ARTHUR MILLER, *their Counsel.*

STATE OF MISSOURI, *County of Jackson, ss:*

Arthur Miller, being duly sworn, on his oath deposes and says that he is the general attorney and counsel for Alexander New and Henry C. Ferris, receivers of the railroad and property of Missouri, Oklahoma & Gulf Railway Company, complainants in the foregoing bill; that he is cognizant of the matters and things set forth in the foregoing bill of complaint, and in the absence of the receivers makes this affidavit for and on their behalf, and says that the matters and things set forth in the foregoing bill of complaint and the statements therein contained are true.

ARTHUR MILLER.

Subscribed and sworn to before me this 20th day of November, 1916. My commission expires March 1, 1919.

[SEAL.]

EDWIN CAMACH,
*Notary Public, Jackson County, Missouri.*

26 EXHIBIT "A."

No. 35.

ARTICLE 1 (a). In all road service 100 miles or less, eight hours or less will constitute a day except in passenger service. Miles in excess of 100 will be paid for at the same rate per mile.

(b) On runs of 100 miles or less overtime will begin at the expiration of eight hours.

(c) On runs of over 100 miles overtime will begin when the time on duty exceeds the miles run divided by 12½ miles per hour.

(d) All overtime to be computed on the minute basis and paid for at time and one-half times the pro rata rate.

(e) No one shall receive less for eight hours or 100 miles than they now receive for a minimum day or 100 miles for the class of engine used or for service performed.

(f) Time will be computed continuously from time required for duty until release from duty and responsibility at end of day or run.

ARTICLE 2 (a). Eight hours or less shall constitute a day in all yard and switching service. The minimum day's pay for 8-hour yards shall not be less than the present day's pay for 10-hour yards; provided, that in yards having a minimum day of more than 10 hours the present day's pay, as in effect January 1, 1916, will be continued with the 8-hour day.

(b) Time to be computed continuously from time required for duty until released from duty and responsibility at end of day or run. All over 8 hours within any 24-hour period to be computed and paid for at the rate of time and one-half time.

(c) All overtime to be computed on the minute basis.

ARTICLE 3 (a). Eight hours or less at present 10 hours' pay will constitute a day's work in hostling service.

(b) Time to be computed continuously from time required for duty until released from duty and responsibility at end of day or run. All over 8 hours within any 24-hour period to be computed and paid for at the rate of time and one-half time.

27 (c) All overtime to be computed on the minute basis.

Article 4. Any rates of pay, including excess mileage or arbitrary differentials that are higher, or any rules or conditions of employment contained in individual schedules in effect January 1, 1916, that are more favorable to the employees, shall not be modified or affected by any settlement reached in connection with these proposals. The general committee representing the employees on each railroad will determine which is preferable and advise the officers of their company. Nothing in the settlement that may be reached on the above submitted articles is to be construed to deprive the employees on any railroad from retaining their present rules and accepting any rates that may be agreed upon or retaining their present rates and accepting any rules that may be agreed upon.

EXHIBIT "B."

*Address of the President (H. Doc. No. 1340).*

The PRESIDENT. Mr. Speaker, Mr. President, and gentlemen of the Congress, I have come to you to seek your assistance in dealing with a very grave situation which has arisen out of the demand of the employees of the railroads engaged in freight-train service that they be granted an eight-hour working day, safeguarded by payment for an hour and half of service for every hour of work beyond the eight.

The matter has been agitated for more than a year. The public has been made familiar with the demands of the men and the argu-

ments urged in favor of them, and even more familiar with the objections of the railroads and their counter demand that certain privileges now enjoyed by their men and certain bases of payment worked out through many years of contest be reconsidered, especially in their relation to the adoption of an eight-hour day. The matter came some three weeks ago to a final issue and resulted in a complete deadlock between the parties. The means provided by law for the mediation of the controversy failed and the means of arbitration for which the law provides were rejected.

28 The representatives of the railway executives proposed that the demands of the men be submitted in their entirety to arbitration, along with certain questions of readjustment as to pay and conditions of employment which seemed to them to be either closely associated with the demands or to call for reconsideration on their own merits; the men absolutely declined arbitration, especially if any of their established privileges were by that means to be drawn again in question. The law in the matter put no compulsion upon them. The four hundred thousand men from whom the demands proceeded had voted to strike if their demands were refused; the strike was imminent; it has since been set for the fourth of September next. It affects the men who man the freight trains on practically every railway in the country. The freight service throughout the United States must stand still until their places are filled, if, indeed, it should prove possible to fill them at all. Cities will be cut off from their food supplies, the whole commerce of the Nation will be paralyzed, men of every sort and occupation will be thrown out of employment, countless thousands will in all likelihood be brought, it may be, to the very point of starvation, and a tragical national calamity brought on, to be added to the other distresses of the time, because no basis of accommodation or settlement has been found.

Just so soon as it became evident that mediation under the existing law had failed and that arbitration had been rendered impossible by the attitude of the men, I considered it my duty to confer with the representatives of both the railways and the brotherhoods, and myself offer mediation, not as an arbitrator, but merely as spokesman of the Nation, in the interest of justice, indeed, and as a friend of both parties, but not as judge, only as the representative of one hundred millions of men, women, and children who would pay the price, the incalculable price, of loss and suffering should these few men insist upon approaching and concluding the matter in controversy between them merely as employers and employees, rather than as patriotic citizens of the United States looking before and after and ac-

29 cepting the larger responsibility which the public would put upon them.

It seemed to me, in considering the subject matter of the controversy, that the whole spirit of the time and the preponderant evidence of recent economic experience spoke for the eight-hour day. It has been adjudged by the thought and experience of recent years

a thing upon which society is justified in insisting as in the interest of health, efficiency, contentment, and a general increase of economic vigor. The whole presumption of modern experience would, it seemed to me, be in its favor, whether there was arbitration or not, and the debatable points to settle were those which arose out of the acceptance of the eight-hour day rather than those which affected its establishment. I therefore proposed that the eight-hour day be adopted by the railway managements and put into practice for the present as a substitute for the existing ten-hour basis of pay and service; that I should appoint, with the permission of the Congress, a small commission to observe the results of the change, carefully studying the figures of the altered operating costs, not only, but also the conditions of labor under which the men worked and the operation of their existing agreements with the railroads, with instructions to report the facts as they found them to the Congress at the earliest possible day, but without recommendation; and that, after the facts had been thus disclosed, an adjustment should in some orderly manner be sought of all the matters now left unadjusted between the railroad managers and the men.

These proposals were exactly in line, it is interesting to note, with the position taken by the Supreme Court of the United States when appealed to to protect certain litigants from the financial losses which they confidently expected if they should submit to the regulation of their charges and of their methods of service by public legislation. The court has held that it would not undertake to form a judgment upon forecasts, but could base its action only upon actual experience; that it must be supplied with facts, not with calculations and opinions, however scientifically attempted. To undertake to arbitrate the question of the adoption of an eight-hour day in the light of results merely estimated and predicted would be to undertake an enterprise of conjecture. No wise man could undertake it, or, if he did undertake it, could feel assured of his conclusions.

I unhesitatingly offered the friendly services of the administration to the railway managers to see to it that justice was done the railroads in the outcome. I felt warranted in assuring them that no obstacles of law would be suffered to stand in the way of their increasing their revenues to meet the expenses resulting from the change so far as the development of their business and of their administrative efficiency did not prove adequate to meet them. The public and the representatives of the public, I felt justified in assuring them, were disposed to nothing but justice in such cases and were willing to serve those who served them.

The representatives of the brotherhoods accepted the plan, but the representatives of the railroads declined to accept it. In the face of what I can not but regard as the practical certainty that they will be ultimately obliged to accept the eight-hour day by the

concerted action of organized labor, backed by the favorable judgment of society, the representatives of the railway management have felt justified in declining a peaceful settlement which would engage all the forces of justice, public and private, on their side to take care of the event. They fear the hostile influence of shippers, who would be opposed to an increase of freight rates (for which, however, of course, the public itself would pay); they apparently feel no confidence that the Interstate Commerce Commission could withstand the objections that would be made. They do not care to rely upon the friendly assurances of the Congress or the President. They have thought it best that they should be forced to yield, if they must yield, not by counsel, but by the suffering of the country. While my conferences with them were in progress, and when to all outward appearance those conferences had come to a standstill, the representatives of the brotherhoods suddenly acted and set the strike for the fourth of September.

31 The railway managers based their decision to reject my counsel in this matter upon their conviction that they must at any cost to themselves or to the country stand firm for the principle of arbitration which the men had rejected. I based my counsel upon the indisputable fact that there was no means of obtaining arbitration. The law supplied none; earnest efforts at mediation had failed to influence the men in the least. To stand firm for the principle of arbitration and yet not get arbitration seemed to me futile, and something more than futile, because it involved incalculable distress to the country and consequences in some respects worse than those of war, and that in the midst of peace.

I yield to no man in firm adherence, alike of conviction and of purpose, to the principle of arbitration in industrial disputes; but matters have come to a sudden crisis in this particular dispute and the country had been caught unprovided with any practicable means of enforcing that conviction in practice (by whose fault we will not now stop to inquire). A situation had to be met whose elements and fixed conditions were indisputable. The practical and patriotic course to pursue, as it seemed to me, was to secure immediate peace by conceding the one thing in the demands of the men which society itself and any arbitrators who represented public sentiment were most likely to approve, and immediately lay the foundations for securing arbitration with regard to everything else involved. The event has confirmed that judgment.

I was seeking to compose the present in order to safeguard the future; for I wished an atmosphere of peace and friendly cooperation in which to take counsel with the representatives of the Nation with regard to the best means for providing, so far as it might prove possible to provide, against the recurrence of such unhappy situations in the future—the best and most practicable means of securing calm and fair arbitration of all industrial disputes in the days to come.

This is assuredly the best way of vindicating a principle, namely, having failed to make certain of its observance in the present,
32 to make certain of its observance in the . But I could only propose. I could not govern the will of others who took an entirely different view of the circumstances of the case, who even refused to admit the circumstances to be what they have turned out to be.

Having failed to bring the parties to this critical controversy to an accommodation, therefore, I turn to you, deeming it clearly our duty as public servants to leave nothing undone that we can do to safeguard the life and interests of the Nation. In the spirit of such a purpose, I earnestly recommend the following legislation:

First. Immediate provision for the enlargement and administrative reorganization of the Interstate Commerce Commission along the lines embodied in the bill recently passed by the House of Representatives and now awaiting action by the Senate; in order that the commission may be enabled to deal with the many great and various duties now devolving upon it with a promptness and thoroughness which are with its present constitution and means of action practically impossible.

Second. The establishment of an eight-hour day as the legal basis alike of work and of wages in the employment of all railway employees who are actually engaged in the work of operating trains in interstate transportation.

Third. The authorization of the appointment by the President of a small body of men to observe the actual results in experience of the adoption of the eight-hour day in railway transportation alike for the men and for the railroads, its effects in the matter of operating costs, in the application of the existing practices and agreements to the new conditions, and in all other practical aspects, with the provision that the investigators shall report their conclusions to the Congress at the earliest possible date, but without recommendation as to legislative action, in order that the public may learn from an unprejudiced source just what actual developments have ensued.

Fourth. Explicit approval by the Congress of the considera-
33 tion by the Interstate Commerce Commission of an increase of freight rates to meet such additional expenditures by the railroads as may have been rendered necessary by the adoption of the eight-hour day and which have not been offset by administrative readjustments and economies, should the facts disclosed justify the increase.

Fifth. An amendment of the existing Federal statute, which provides for the mediation, conciliation, and arbitration of such controversies as the present by adding to it a provision that in case the methods of accommodation now provided for should fail, a full public investigation of the merits of every such dispute shall be instituted and completed before a strike or lockout may lawfully be attempted.

And, sixth, the lodgement in the hands of the Executive of the power, in case of military necessity, to take control of such portions and such rolling stock of the railways of the country as may be required for military use and to operate them for military purposes, with authority to draft into the military service of the United States such train crews and administration officials as the circumstances require for their safe and efficient use.

This last suggestion I make because we can not in any circumstances suffer the Nation to be hampered in the essential matter of national defense. At the present moment circumstances render this duty particularly obvious. Almost the entire military force of the Nation is stationed upon the Mexican border to guard our territory against hostile raids. It must be supplied, and steadily supplied, with whatever it needs for its maintenance and efficiency. If it should be necessary for purposes of national defense to transfer any portion of it upon short notice to some other part of the country for reasons now unforeseen, ample means of transportation must be available, and available without delay. The power conferred in this matter should be carefully and explicitly limited to cases of military necessity, but in all such cases it should be clear and ample.

34 There is one other thing we should do if we are true champions of arbitration. We should make all arbitral awards judgments by record of a court of law in order that their interpretation and enforcement may lie not with one of the parties to the arbitration, but with an impartial and authoritative tribunal.

These things I urge upon you not in haste or merely as a means of meeting an emergency, but as permanent and necessary additions to the law of the land, suggested, indeed, by circumstances we had hoped never to see, but imperative as well as just, if such emergencies are to be prevented in the future. I feel that no extended argument is needed to commend them to your favorable consideration. They demonstrate themselves. The time and the occasion only give emphasis to their importance. We need them now and we shall continue to need them.

35 EXHIBIT No. 1.

*Articles of agreement between Missouri, Oklahoma & Gulf Railway Co. leased and operated lines and the Brotherhood of Locomotive Engineers.*

It is hereby agreed by the management of the railway company named above and its engineers that the following rules, regulations, and rates of pay will apply and govern, commencing July 1, 1913, and will not be changed without thirty days' notice.

All former rules, regulations, and rates of pay are void.

## Article 1.

SECTION A. The following will be the schedules of wages for engineers on the above-named lines, regulations relating thereto effective July 1, 1913, supersedes all agreements in effect:

| Class of service. | Rate. | Mi. per hr. basis. | Overtime per hour. |
|---|---|---|---|
| | 100 mi. or less. | | |
| Passenger | $4.40 | 18 | $ .44 |
| Local freight, other than Mallet | 5.55 | 10 | .555 |
| Local freight, Mallet type | 6.50 | 10 | .65 |
| Through freight, other than Mallet | 5.20 | 10 | .52 |
| Through freight, Mallet engine | 6.15 | 10 | .615 |
| Yard engine, other than Mallet | 4.25 | 10 | .425 |
| Work train, other than Mallet | 4.40 | 10 | .44 |
| Mixed runs, other than Mallet | 5.55 | 10 | .555 |
| Mixed runs, Mallet engine | 6.50 | 10 | .65 |
| Mine runs, other than Mallet | 5.55 | 10 | .555 |
| Mine runs, Mallet | 6.50 | 10 | .65 |

### Motor-car service.

SEC. B. $4.15 will be paid for ten hours or less. For more than ten hours overtime at the rate of 41.5 cents per hour, time to be counted from one hour before leaving time of first trip and to end on arrival at terminal of final trip.

When additional motor cars are put into service or vacancies occur in motor service engineers may make application for same and will be assigned to service according to seniority, ability, and qualifications, the qualifying features to be decided by the superintendent and superintendent motive power and equipment.

36 Engineers making application for motor-car service and those qualifying as motormen will retain their rights in steam service, with the understanding that having accepted the motor-car service they will remain in such service until they can be relieved by an engineer who has qualified for such service.

Motormen will be expected to keep their cars in condition, as far as possible, without extra compensation.

It is agreed that whenever the rates paid for motor-car service are increased or more favorable conditions are granted by railways in this territory, similar increases and conditions will be applied to this service.

## Article 2.

Section A. Time shall begin at time set for departure of train and end when relieved at completion of trip, day's work, or run. When computing overtime, except when otherwise stated, the first thirty minutes will be counted as one hour and additional overtime for each succeeding hour will be allowed.

Section B. Thirty minutes' delay prior to departure, or thirty minutes' delay after arrival, and each consecutive hour thereafter shall constitute terminal delays and be paid for at regular overtime rates according to class of engine run. (For example) Terminal time arriving will consist of aggregate of delays at each stop within terminals, except in making ordinary stops at railway crossings. Same applies as to terminal time that may be made before departure of trains.

Article 3.

Time consumed by engineers in through freight service loading or unloading stock or material at or between stations, switching at stations, and other similar service, will be paid for on the following basis as overtime:

No overtime will accrue unless time aggregating thirty minutes, in periods of ten minutes or more; thirty minutes to sixty minutes will be counted as one hour; in excess of sixty minutes actual time will be allowed.

On runs, straightaway or turn around, aggregating less than ninety miles, no overtime will be allowed under this article until the equivalent of ninety miles, in either miles or hours, has been given.

(Example.) If an engineer makes a run aggregating 70 miles in seven hours, he may be required to perform enroute, the character of service referred to in this article, to the extent of two hours before its terms become applicable. On a run aggregate 70 miles in eight hours, one hour of similar service may be required before its terms are applicable.

On a run aggregating 70 miles made in nine hours, the terms of this article have full application.

Article 4.

Engineers deadheading by order of the company, when deadheading on passenger trains, will be allowed one-half mileage at rate of the service they are deadheading for, with a minimum of one-half day.

37 When deadheading on other trains will be allowed full freight rates, exclusive of overtime, with a minimum of fifty miles. If not used in other service within eighteen hours from time or arrival at destination, will be allowed one day at through freight rates, and one day for each day thereafter held away from home terminal, under the same rules that would apply to the regular engineer whom he was sent to relieve.

Engineers sent to bring in trains which are tied up under the hours-of-service law will not be considered in deadhead service, but as in continuous service from time called to leave until arrival at terminal.

Extra engineers who are not being used will report each day by wire to the superintendent.

Article 5.

Engineers breaking in engines will be allowed through freight rate for such service, overtime after ten hours at regular overtime rates. Engineers may be selected by the company for this service.

Article 6.—Attending court.

Engineers, when required by the company to serve as witnesses at court, will be allowed the mileage made by their engine or runs during their absence in such service, and in addition three dollars per day for expenses when used in above capacity away from home; extra engineers to be classed the same as regular engineers in place of the regular engineer and when not so running to be allowed pay at the rate of $5.00 per day and $3.00 per day for expenses when used in such service away from home. The company to furnish necessary transportation. If used as a witness at court and not required to lose any time, engineers will receive 100 miles per day at rate in which they are regularly employed.

The company will be entitled to their mileage and witness fees.

Article 7.

Engineers running light engines over the road will be paid passenger pay if running as section of passenger train or freight rates if otherwise.

Article 8.—Sherman-Gover run.

Engineers may be assigned to run between Gover and Sherman, with pay for this service at local freight rate, to make as many trips as necessary between the above or intermediate points. If run outside of these limits, a new day will begin.

Denison will be considered the home terminal and any trip started from that point after the expiration of ten hours from time first trip began will be considered as beginning a new day.

38 The home terminal within above limits may be changed by giving five days' notice of such change.

No terminal overtime will be allowed on this run.

Bromide run: Engineers on what is known as the Bromide run, between Bromide and Wapanucka, will be paid through freight rates, and will be in continuous service from the time they begin work until released for the day, one hundred miles or less, ten hours or less, to constitute a day.

Road overtime will be allowed on this run.

Article 9.

Engineers held off their runs for special service will be paid according to class of service performed, it being agreed that in no case shall

he receive less than the amount he would have received had he remained on his regular run.

Article 10.

A minimum of ten miles will be allowed for doubling hills (except when the double is caused by stopping to head in siding) in addition to all other time and mileage made on the trip. When necessary to run for coal or water, actual mileage will be allowed.

When necessary to cut-off engine for purpose of helping another train over the hill, it shall be considered a double.

The mileage allowed under this article will be added to other mileage made on the trip in computing road overtime.

Article 11.

An engineer, when called for duty and relieved without going out, shall receive one-half day's pay, and stand first out, except when held on duty over five hours he shall receive one day's pay and stand last out.

Article 12.

Engineers, if run around at terminals through no fault of their own, will receive one day's pay and will take their turn out behind other engineers in their assigned service; this not to apply to engineers held in compliance with the hours-of-service law.

Article 13.

Engineers may be tied up in case of washouts or burned bridges, in which case the tie-up ends the day; when they resume service a new day will begin.

Article 14.

An engineer is understood to have reached the terminal of any trip at any division or district when he reaches the division or dis-
39 trict terminal at which the engine of trains are usually changed or the terminal of the train on which trip is made, and having done so, and proceeding further with the same train, or being sent out on another trip, he is understood to have begun another trip, and will be paid for another trip.

Article 15.

All overtime will be paid for on basis set forth in article 1.

Article 16.

Engineers will be notified when time claimed is not allowed, and will not be required to get conductors or yardmasters to O. K. time

slips for the time claimed. Engineers' tie-up will be checked from roundhouse register instead of conductors' register.

Article 17.

Engineers in work-train service making over 100 miles per day will be paid at through freight rates.

Engineers in regular road service or extra men representing such regular men, when used in work-train service, will be paid the freight rates specified in article 1.

When engineers in work-train service are tied up away from a terminal minimum day will be allowed for each twenty-four hours so held, unless other service is performed.

Work-train crews will, as far as practicable, be tied up where they will have eating and sleeping accommodations.

Terminal overtime will not be allowed under this article.

Article 18.

The right to regular engines or runs in switching on road service shall be governed by seniority, but when an engineer fails to accept or claim an engine or run that may become vacant, he thereby waives all right to same until vacant again, except where an engineer loses an engine or run through no fault of his own, he will then be assigned according to his seniority. All engines or runs becoming vacant will be advertised ten days before assignments are made.

Article 19.

No deductions should be made for days regular local freight or mixed train engineers are idle through no fault of their own, and except in cases of wrecks, washouts, or tracks otherwise obstructed, and if for any reason the local is annulled and the engineer is used in through-freight service in order to have them at the end of the run to come out on their run, they should be paid the local rate for the through-freight run that date, but if for any reason the local engineer is used for local run and is paid the local rates, the local engineer to run to the other end of the district later in the day in order to come out on their regular run, should be paid through-freight rates, as the company has already paid for local freight service on that date. It is understood that engineers assigned to local-freight runs will be allowed to make the working days in the month, subject to the above provisions.

40 Article 20.

Engineers in through freight service will run first in and first out of terminals.

Sec. A. No more engineers will be assigned than are necessary to move the traffic with promptness and dispatch. This will be de-

termined by the master mechanic and the engineers' committee to the satisfaction of the master mechanic and the engineers' committee. When traffic is so light on any district that engineers are not making reasonable wages the number assigned will be reduced so that those remaining in service can have approximately 3,000 miles per month.

Article 21.

When an engineer is engaged in two or more classes of service on same day or trip, the highest rate will be paid for the entire day or trip.

Article 22.

Engineers who are permitted to lay off before completing an assigned day's work will be allowed the actual time or mileage made. Engineers relieving them will be allowed at least a minimum day's pay. The regular assigned engineer will not be allowed pay for deadheading.

Article 23.

Engineers in yard service will be allowed one hour off duty between the hours of 11.30 a. m. and 1 p. m., and 11.30 p. m. and 1.00 a. m. for meals. If held on duty during any part of the meal hour, they shall be allowed thirty minutes for meals and one extra hour. Yard engineers will not be held on duty to exceed six hours without being allowed thirty minutes for meals.

Article 24.

The company will arrange to issue meal books or tickets good at designated eating houses on the system, and arrange to have two eating houses at each place, this to be left to the discretion of superintendent.

Engineers will be allowed a reasonable length of time for eating at convenient places, but the train dispatcher will be notified of the intention to eat and operator will deliver all messages to eating houses.

Article 25.

Engineers will not be required to check train register, and must be furnished with register check by their conductors.

Article 26.

Passenger engineers required to switch their trains or turn their engines at a terminal before the day's work begins or after it is completed will be allowed one hour overtime each day for such service.

41 Article 27.

Except as provided in article 27, engineers in road service will not be tied up between terminals unless tied up in compliance with the hours-of-service law.

Under the laws limiting the hours of duty crews in road service will not be tied up unless it is apparent that the trip can not be completed within the lawful time, and not then until after the expiration of fourteen hours on duty, under the Federal law, or within two hours of the time limit provided by State laws, if the State laws govern.

If road crews are tied up in a less number of hours than provided in the preceding paragraph they shall not be regarded as having been tied up under the law, and their services will be paid for under this schedule.

When road crews are tied up between terminals under the law they shall again be considered on duty and under pay immediately upon the expiration of the minimum legal period off duty applicable to the crew, provided the longest period of rest required by any member of the crew, either eight or ten hours, to be the period of rest for the entire crew.

A continuous trip will cover movement straightaway or turn around from initial point to the destination train is making when ordered to tie up. If any change is made in the destination after crew is released for rest a new trip will commence when the crew resumes duty.

Road crews tied up under the law will be paid the time or mileage of their schedules from the initial point to the tie-up point. When such crews resume duty on a continuous trip they will be paid miles or hours, whichever is the greater from tie-up point to the next tie-up point or the terminal. It is understood that this article does not permit crews to be run through terminals unless such practice is permitted under other articles of the schedule.

Road crews tied up for rest under the law and then towed or deadheaded into the terminal, with or without engine or caboose, will be paid therefor as provided in the preceding paragraphs, the same as if they had run the train to such terminal.

If any service is required of an engine crew or if held responsible for the engine during the tie-up under the law they will be paid for all such service.

Article 28.

Sec. A. Turn-around runs will be from a terminal to an intermediate station and return to that terminal.

Sec. B. On turn-around runs an engineer may be assigned to a succession of trips between a terminal and the same or an intervening intermediate point within a distance of twenty miles from the terminal, provided that any trip started from the terminal, after

the expiration of ten hours from the time the first trip was started, shall be considered to have begun a new day.

It is agreed that should any of the regular turn-around runs which are established under this schedule be discontinued they
42 may be restored upon the same terms that now obtain with respect to number of trips made, and that regular runs may be established to run between designated intermediate points between division terminals; one of these points will be designated as the home terminal.

Article 29.

One engineer will be hired for each fireman promoted from date, September 15th, 1910.

Article 30.

Ice will be furnished on engines from March first to December first; twenty-five pounds on local engines, fifteen pounds on other engines.

Article 31.

Engineers upon leaving the service of the company will be given a service letter stating how long in service, in what capacity, and cause of leaving. Such letter to be furnished by the master mechanic within five days after requested.

Article 32.

Roundhouse force will place necessary equipment on engines before leaving roundhouse or terminal. Engineers will see that the following supplies are placed on engines: Frogs, carons, individual tool boxes, and signal flags. They will also oil dynamo. Engines will be gotten ready for road service at terminals. This is understood to govern a supply of coal, water, sand, oil, and all tools necessary for road trips; ash pans cleaned, grease cups filled, wedges set up, and headlights cleaned.

Article 33.

Engine inspectors will be kept at Muskogee and Denison and will be responsible for proper inspection of all engines arriving and departing from these terminals. This is not understood to relieve engineers from making a reasonable outside inspection.

Article 34.

When engines are pooled a regular list of engineers necessary to move the traffic will be established and balance of engineers placed on the extra list. Engineers will not be changed from pool system to regular assigned engines or vice versa without ten days' notice.

Article 35.

Engineers will not be kept away from terminals an unreasonable length of time; when the necessity of the service results in the bunching of the regular assigned crews at one terminal away from the origin of traffic on the division they will be deadheaded or run back in such a manner as to protect the business of the company with the number of regular assigned crews on division.

43 Article 36.

Deadhead crews will be considered first in on arrival at terminals, and deadheading crews deadheading away from terminals will be the first out.

Article 37.

There will be a work report book placed on each engine and kept there for the purpose of engineers reporting the repairs necessary on engines, in which they will register their name and fireman's name, the time they arrived, and the time they tied up. Hostlers will be required to transfer the names and time to roundhouse registers. This book to be left on engine and all reports remain in same.

Article 38.

Engineers will be called day or night by a caller; the caller will be furnished with a book containing the engine number and train number, time called, and time set to depart, in which engineers will sign their names. Engineers will be called within a radius of one mile from passenger depot and not more than one hour and thirty minutes and not less than one hour in advance of time set to depart.

Article 39.

When mileage of any run is increased or decreased three hundred miles or more per month, the time changed from day to night or night to day, or if time of lay-over away from home terminal is changed three hours or more, or if lay-over point is changed, it will be declared vacant and bulletined. Runs will, as far as practicable, be so arranged that the principal lay-over will be at home terminal. No pay will be allowed for deadheading when changes are made in accordance with this article.

Article 40.

Engineers accepting an official position with the company or employed by the Brotherhood of Locomotive Engineers will retain their rights on engineers' seniority list.

Article 41.

Engineers will not be required to fill oil cans, lubricators, or draw supplies, such as carbon, oil, and waste, at division terminals, and will not be held responsible for depth of water or fuel on tanks, or make out statement or requisitions governing same at these points.

Article 42.

Sec. A. When engineers on local runs have lay-over away from home on Sunday, they will be permitted to return and spend Sunday at home, provided it does not interfere with the service. Transportation will be granted for such trips, but no time allowed for deadheading.

Sec. B. If ordered to remain at terminal on lay-over day, will be paid for service performed at established rate for such service,
44 and if not used will be allowed 100 miles at through freight rate.

It is understood that engineers who are permitted to return to spend Sunday at home will be required to protect the local run to which he is assigned, and that the company is under no obligation to furnish facilities for this deadheading aside from furnished passes.

Article 43.

Engineers will not be disciplined or discharged until they have been given an investigation and their guilt established unless the employe signs waiver of investigation and accepts discipline offered.

Sec. A. Investigating committee will be composed of the master mechanic or his representative, or superintendent or his representative, and *en* engineer representing the employe accused. A stenographic copy will be taken of all proceedings and the testimony of all witnesses, together with the decision of the investigating committee, which decision shall be rendered within five days from the date of investigation. Each member of the committee to be furnished with copy; also interested employee, if he makes application therefor in writing. Each party will be allowed to call in witnesses to testify pertaining to the case, if they so desire.

Sec. B. Employe will have the right to appeal through the committee of his choice, if he so desires, to higher officials for further hearing by giving notice in writing within fifteen days from date of first investigation, which appeal will be heard within five days from notice, or as soon thereafter as possible.

Sec. C. After investigation, if the investigating committee fails to agree, or in case committee is dissatisfied with the results of hearing of the appealed case, they will have the right to take the case to a higher officer of the company for final settlement.

Sec. D. Necessary transportation will be furnished to parties to and from investigation.

Sec. E. Any engineer caused to lose time by the company failing to conduct investigation in line with this article will be paid for all time lost, regardless of any other facts that may thereafter develop, except aggravated cases, such as serious collisions and intoxication.

Article 44.

Should at any time the Missouri, Oklahoma & Gulf Railroad change hands or be absorbed by any other railway, railroad, or system, all engineers employed by the Missouri, Oklahoma & Gulf Railway Company will hold their rights and seniority the same as before and will not be displaced by the engineers from the absorbing line.

Article 45.

Extra engineers will be kept at home terminals and will be run first in first out of these terminals, filling all vacancies in all classes of service except passenger service. When an extra engineer in his turn catches an engine or run he may hold it for ten days, unless he lays off or is relieved by the regular man; after ten days he may be displaced by the senior engineer desiring to fill such vacancy.

In case of temporary vacancy in passenger service the senior engineer available will be entitled to fill such vacancy, it being understood that any engineer filling this vacancy may be displaced by a senior engineer at any time while such vacancy exists, but no man shall be allowed to hold two runs.

Article 46.

Engineers will be assigned to separate districts according to seniority, and will have rights to new vacant or preferred runs over the entire system and will be assigned to run according to their seniority. All new and vacant runs will be advertised ten days before assignment is made.

Article 47.

When an engineer is run off his home division he shall, upon completion of trip, be deadheaded back to his home division at deadhead rates.

If held to work back, his time shall commence after being held twenty-four hours (except where held by wrecks, washouts, or line is blocked by other causes), and the same rate of pay will be allowed for all time held as per the previous trip, after held twenty-four hours.

Article 48.

All engines will be handled at terminal points by hostlers, and engineers will not be expected to take engines to and from trains except at such points as may be decided upon by the general superintendent, master mechanic, or other representatives, and the engineers affected.

Article 49.

All questions pertaining to rates, rules, and working conditions of locomotive engineers will be considered by the officers of the company with the regularly authorized committee of the Brotherhood of Locomotive Engineers.

The committee will be furnished with the company's records upon request. It is understood that any engineer feeling himself aggrieved may be represented by the committee of his choice and have his case adjusted under the terms of this schedule in accordance with the interpretation placed upon its several articles by the company and the regularly authorized engineers' committee.

Article 50.

Engineers will not be required to shove or handle cars ahead of engine on main line between stations except in case of washout, wrecks, or blockades, or in mine and yard work.

Article 51.

M., O. & G. engineers, when available, will pilot engines of trains from foreign roads when such trains are being detoured over the lines of the M., O. & G. Railway.

46 Article 52—Backing up.

Engineers in road service will not be required to back up except when doubling hills, running for water, breaking in to, or on account of wrecks or washouts.

Work trains, mine runs, trains required to back up one way, and helpers not included.

Article 53.

Should it become necessary to reduce the number of engineers on account of slack business, those who have been promoted from rank of fireman will take such positions as their seniority as firemen would entitle them to, and will again resume their rank as engineers in turn when necessary to increase the number of engineers, provided they will take service as such when called upon. Engineers who have been hired will be returned to service in turn, provided they keep

the master mechanic and chairman advised of their whereabouts and report for duty within thirty days after having been notified to do so.

Article 54.

No grievance will be considered in cases happening previous to September 15th, 1910.

Article 55.

Engineers will be assigned to regular time-card runs or pool turns regardless of engine furnished.

Article 56.

The seniority of all engineers shall date from their first service as an engineer when regularly assigned; no other service shall be considered.

Engineers promoted from rank of fireman will be placed on seniority roster as regards each other, in conformity with agreement reached between committee of general managers and representatives of the B. of L. F. and E., at Chicago, March 23, 1910.

Article 57.

No fines will be imposed upon engineers for loss or breakage of tools, for damage incurred by accident to rolling stock, or for stock killed or injured. Engineers agree to use their best efforts to avoid accidents and damage as far as possible.

Article 58.

Engineers' took box will be taken off and put on engine by roundhouse force, and when engineers are deadheaded the same force will put tool boxes and oil cans on trains.

47 Article 59.

The engineers' committee will be granted leave of absence and will be furnished with M. O. & G. annual transportation.

Article 60.

When engineer's time is found to be short on pay roll to the amount of $2.00 or more, through no fault of their own, a time check will be issued to him at once for all shortage of the amount, and if less than $2.00 may be carried over to the next pay day.

Article 61.

An engineer that has been in the service of this company one year or more and feels that he could better his condition by going into

business other than running an engine, will be given a leave of absence of one year, subject to the approval of the engineers, and should he fail to return at the end of the year he shall be considered out of the service, and if they accept a position running an engine on another railway without the consent of the engineers affected they shall lose their seniority; this is not to apply to engineers who have been cut off the board in reducing the force on account of slack business.

Sec. A. Any engineer who has been an employe of this company sixty days, his application or reference must stand approved.

Article 62.

When it becomes necessary for engineers to change their residence on account of change of card or division, or on account of seniority rights, they shall be furnished free transportation for their family and household goods, by making written application for same through their master mechanic or foreman, when same does not conflict with the law.

Article 63.

Transportation will be furnished to engineers and to their families over the lines of this company when application is made to their master mechanic or foreman.

Article 64.

All motive power in road or yard service will be handled exclusively by engineers in active service holding rights as locomotive engineers on our seniority list, and all engines going over the road under steam will be in charge of an engineer.

Article 65.

Members of the Brotherhood of Locomotive Engineers looking for employment, when vouched for by any B. of L. E. engineer on M. O. & G. will be furnished free transportation over the M. O. & G. Ry. when the laws do not forbid.

48 Article 66.

Engines of this company shall be furnished soon as possible with clothes boxes, seats, water buckets, cushions, cushioned arm rests, back and side curtains, awning over side windows, openings in cabs kept closed, and cab put in neat condition before starting on trip. Also, boiler heads to be lagged as fast as engines go through shops.

Article 67.

Any ruling made with reference to any of the articles enumerated herein by proper officials of the company will be made in writing and general chairman of the engineers' committee will be furnished

copy of said ruling, but said ruling shall not be made effective until agreed to between the parties herein mentioned.

Article 68—Violation of agreement.

If an engineer is ordered to perform service contrary to articles enumerated herein, he shall be so ordered in writing by proper officer, and shall obey, but may protest to the officer giving the order and at the earliest opportunity thereafter will refer the matter to such higher officials of the company as in premises may be proper as well as to the general chairman of the engineers' committee.

Article 69.

The company on its part and the engineers on their part agree with each other that they will perform the several stipulations and duties required as provided for in this agreement, until thirty days' notice shall be given for a change in the same.

For the railway company:

W. COUGHLIN,
*General Superintendent.*
G. E. PERRY,
*S. M. P. & E.*

For engineers:

A. GANDY, *Chairman.*
T. P. DOWD, *Vice Chairman.*
D. N. WOOSTER, *Sec. and Treas.*
E. CORRIGAN, *A. G. C. E.*

49 EXHIBIT No. 2.

*Agreement between the Missouri, Oklahoma & Gulf Railway Company and Brotherhood of Locomotive Firemen and Enginemen.*

Effective July 1st, 1913, the following will be the established rates of wages and regulations relating thereto for firemen and enginemen of the above-named company, and comprises all agreements and rulings in effect to date:

| Class of service. | Rates of pay. | Rate of overtime. |
|---|---|---|
| Passenger, 100 miles or less | $2.65 | $ .265 |
| Local freight, 10 hours or less | 3.55 | .355 |
| Through freight, 10 hours or less | 3.30 | .33 |
| Coal and mine run | 3.55 | .355 |
| Work trains | 2.70 | .27 |
| Switch engine | 2.50 | .25 |
| Through freight, Mallet engine, and work train 10 hours or less | 4.00 | .40 |
| Local freight, Mallet engine, 10 hours or less | 4.25 | .425 |
| Hostling, days, per month | 82.60 | ..... |
| Hostling, nights, per month | 87.60 | ..... |

(Example:) Switching crews going to work at 7.00 a. m. and working until 6.00 p. m., one hour for dinner between 11.30 a. m. and 1.30 p. m., will be allowed one day's work. Night crews the same, with supper hours between 11.30 p. m. and 1.30 a. m. When he is required to work noon hour he will be given thirty minutes to eat, same to apply to irregular shifts.

Article 2.

A fireman when called for duty and relieved without going out shall receive one-half day's pay and stand first out, except when held on duty over five hours, when he shall receive one day's pay and stand last out.

Article 3.

Firemen deadheading under company orders shall receive one-half pay for the service they are sent to represent. When deadheading on freight trains they will be allowed full time.

A minimum of fifty miles is allowed for any deadhead trip of 100 miles or less, according to the service engaged in.

Article 4.

Time shall begin at scheduled or marked up time and when returned at completion of day's work or run; when computing overtime, except when otherwise stated, the first thirty-one minutes shall be counted as one hour, and additional overtime for each succeeding hour will be allowed.

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Article 5.

Firemen required to do switching at their terminal station will be allowed overtime for such service on all trains except work train, thirty-one minutes to constitute the first hour and additional overtime for each succeeding hour. Firemen required to remain on duty with their engine after arrival at yard limits of their terminal station will be allowed one hour for the first thirty-one minutes and additional overtime for each succeeding hour, double overtime not to be allowed.

Article 6.

Switch engines working outside of yard limits under train orders or signals shall be paid for actual hours and miles for each class of service.

Article 7.

Firemen will be called not less than one and one-half hours or more than two hours before leaving time and will not be called at a greater distance than one mile from passenger station. If held in yard, firemen will be allowed one hour overtime for the first thirty-one minutes and all succeeding hours.

Article 8.

When firemen are required to watch engines they will be paid firemen's rate of pay for service engine is in.

Article 9.

Firemen ordered to attend court on company business will be paid $2.60 per day. Full days will be allowed for all days on which no other time or mileage is made from the time they are relieved to attend court until they can resume work. If away from home station, transportation and $2.00 per day expenses will be allowed. The company will be entitled to their mileage and witness fees.

Article 10.

Firemen will be notified when time claimed is not allowed and will not be required to get conductor's or yard-master's O. K. on time slips for the time claimed. As per former agreement dated Feb. 15, 1912.

Article 11.

When necessary to double a hill or run for coal or water, or for any cause when same mileage is covered more than once, actual mileage or hours will be allowed.

Article 12.

When fireman is engaged in two or more classes of service on a trip, the highest rate of pay will be paid. This does not apply to Bromide Branch or Wagoner runs.

Article 13.

Work trains making mileage of 100 miles or more per day shall be paid at through freight rates. Terminal overtime not to be paid in work train service.

51 Article 14.

Passenger firemen required to switch their trains or turn their engines at a terminal before the day's work begins or after it is completed will be allowed one hour overtime each day for such service.

Article 15.

Firemen on through or irregular freight trains required to do switching, load or unload stock, company material, or local freight one hour or more at any one point will be paid overtime for such de-

lays; one hour to constitute first hour and each thirty-one minutes thereafter, it being understood double overtime is not to be allowed.

Article 16.

A fireman tied up under the law or held at any place from any cause away from their terminal will, after being held ten hours, receive the regular rate of pay per hour for the service they represent for all time held. Joplin, Miami, Wagoner, for Wagoner run; Muskogee, Allen, Wapanucka, for Bromide run; and Denison only will be considered terminals. It is understood that the railway company has the right to change terminals when necessary. This article, as per former agreement, dated November 15, 1912.

Article 17.

A fireman in charge of dead-head engine shall be paid on the same basis in all respects as for firing and at the highest rate in through freight on each division passed over. Upon arrival at a division or district terminal, where the engine is tied up for the night, he shall report to the master mechanic or foreman in charge, and if his services are not longer required he will be released until called to resume trip. If held more than twenty-four hours at any terminal after delivery of engine at a final destination, he shall be paid prorate of overtime for each twenty-four hours. Deadheading before or after delivery of dead-head engine to be paid the same as any other dead-head time. The senior freight fireman available will have preference for this work. As per former agreement, dated Feb. 15, 1912.

Article 18.

When a fireman is required to run through a terminal, he will be paid 100 miles, same as a new trip. The present terminals are Joplin, Miami, Muskogee, Allen, Denison, and Wapanucka for Bromide runs. As per former agreement, dated February 15, 1912.

Article 19.

Firemen firing light engines will be paid passenger pay. As per former agreement, dated Feb. 15, 1912.

Article 20.

Firemen, when relieved between terminals for rest, not to exceed ten hours' rest at any period, if possible, will be tied up where accommodations can be had.

Firemen will not be required to go out when they need rest, and will decide for themselves to the extent of advising the master mechanic or roundhouse foreman, and indicate on the register the

52 number of hours rest they will require, not to exceed ten hours. This is understood to mean time enough to make ten hours' actual rest before called. As per former agreement, dated Feb. 15, 1912.

Article 21.

Firemen that are held away from their home terminal at any point, except in cases of emergency on account of derailments, wrecks, burned bridges, or washouts, will be paid one day for each 24 hours he is held. As per former agreement dated Feb. 15, 1912.

Article 22.

The right to regular engines or runs in switching or road service shall be governed by seniority and ability, but when a fireman fails to accept or claim an engine or run that may become vacant he thereby waives all right to same until vacant again, except when a fireman loses an engine or run through no fault of his own he will be assigned according to seniority, if capable. All engines or runs becoming vacant will be advertised by the local chairman ten days before assignment is made.

Article 23.

Firemen in through freight service will run first in and first out of terminals. Local firemen will run first in and first out on local. No more firemen will be kept in service than is necessary to handle the business with promptness and dispatch. There will be an extra board established and the extra firemen will also run first in and first out, but when an extra fireman catches an engine or run he will hold it for a period of fifteen days, when the oldest extra man will be placed on run unless he lays off or is relieved by a regular assigned fireman. As per former agreement dated Feb. 15, 1912.

Article 24.

When necessary to increase the force of engineers, one fireman will be promoted to each engineer hired, according to seniority and ability. But if senior fireman is not available or has not the necessary experience, each available and capable fireman will be promoted until necessary number are promoted. It is understood that available, as used in this clause, means that in the event the senior fireman is sick or temporarily disabled, that upon his regaining his normal health within a reasonable time he shall have the right to stand examination for promotion to the engineer's place, and, if qualified, will take his seniority the same as the man with necessary experience must take examination when needed. When a fireman is called for promotion and fails in his examination, he shall be given another trial at the expiration of ninety days, if needed. If he fails

at this, he shall be placed behind all others for promotion and set back to the youngest regular man's run. No fireman will be called up for promotion unless he has had three years' experience as fireman. After this must be called in their turn. As per former agreement dated Feb. 15, 1912.

Article 25.

All engines will be supplied with water coolers and ice from April first to November first.

Article 26.

Firemen leaving the service of the company will be given a service letter if he has been in the service of the company 60 days, stating how long in the service, nature of service, in what capacity,
53 and cause of leaving. Such letter to be furnished within five days, if requested.

Article 27.

Roundhouse foreman will see that necessary equipment is placed on engines before leaving roundhouse or terminals. Engines will be gotten ready for service at all terminals. This is understood to cover a full supply of fire tools, fuel, and water. Firemen will be responsible in seeing that engines are properly equipped.

Article 28.

Firemen will not be required to pay fine for the breakage or loss of tools or damages of any kind.

Article 29.

The oldest eligible fireman is to have preference in all emergency running and the oldest freight fireman is to have preference in extra passenger work, that is vacant for five days or more, working out of terminal where such vacancy occurs, and when he is not available the next oldest fireman will fill the vacancy until the oldest fireman reports for the run.

Article 30.

The use of intoxicating liquor or frequenting places where they are sold will be sufficient cause for dismissal from the service.

Article 31.

Firemen will be assigned to separate divisions according to seniority, and will not be run off their respective divisions except in case of emergency, when he will be deadheaded back on first train. Every fireman will have the right to new vacancy or preferred run over the entire system.

Article 32.

Engines at all terminals shall be handled to and from roundhouse to depot by hostlers. As per former agreement dated Feb. 15, 1912.

Article 33.

Firemen will be allowed a reasonable length of time for eating at convenient places, but train dispatcher must be notified of intention to eat at least one station ahead, and operator will deliver all messages to eating houses. Firemen will tell conductor as to when and where they want to eat, which notification will release them from any responsibility as to delay account of meals not being ready for them. As per former agreement, dated Feb. 15, 1912.

Article 34.

Firemen shall not be discharged or suspended without just and sufficient cause.

Before inflicting punishment in form of dismissal or suspension, unless waiver is signed by fireman, trainmaster, master mechanic, or superintendent will hold investigation if requested by employe involved, except in case of drunkenness. If investigation is deemed necessary, fireman may be present, together with a disinter-
54 ested employe of his choice, all decisions to be rendered within fifteen days, when practicable.

In case of dismissal or suspension, if any fireman thinks sentence unjust, he shall have the right, within ten days, to refer his case, by written statement to superintendent or general manager. Within ten days of receipt of this notice his case shall have a thorough investigation by proper officer of the company, at which investigation he may be present if he so desires and also be represented by a disinterested employe of his choice.

In case he is dissatisfied with the result of the investigation he shall have the right to appeal to the general officers. In case punishment is inflicted and subsequently found to be unjust he shall be reinstated and paid at regular rates for all time lost. No appeal to general officers will be considered unless presented in writing within ten days after committee of adjustment has received decision of master mechanic or superintendent rendered after conference with them.

Article 35.

Firemen accepting official position with this company or employed by the Brotherhood of Firemen, with the approval of this company, will retain their rights on firemen's seniority list. Any fireman who has been in the service one year or more and feels that he could better his condition by going into business other than firing an engine will be given a leave of absence for one year, subject to the approval

of the firemen and railroad company, but should he fail to return within one year he shall be considered out of the service.

Article 36.

Any fireman that has been in the service of the company sixty days his application will stand approved.

Article 37.

When it becomes necessary for firemen to change their residence on account of time cards or division or on account of seniority rights they will be furnished with free transportation for their families and household goods upon written request for same through the master mechanic or foreman when same does not conflict with the law.

Article 38.

The seniority of a fireman will be from date and hour application and records show O. K. after having performed service as a fireman.

Article 39.

Employes on grievance committee and board of adjustment representing the firemen will be granted leave of absence and the chairman will be furnished M. O. & G. annual transportation.

After committee services they may take their run at any division point, the company to pay no deadhead travel caused thereby.

Article 40.

It is understood that in case of any garnishees filed against employes the company will not dismiss the employe against whom garnishment is made unless it is shown that he had willfully refused to meet his obligations. This is to protect firemen against being imposed upon by money loaners and others, and whenever a fireman is making the best possible effort to discharge his proper obligations no action against him will be taken by the company.

Article 41.

One fireman will be promoted for each engineer hired since September 15, 1910, date of old contract, provided there are enough available firemen, before any more engineers are hired.

55 Article 42.

Should at any time the Missouri, Oklahoma & Gulf Railway Company change hands or be absorbed by any other railroad or system, all firemen employed by the Missouri, Oklahoma & Gulf Railway

Company will hold their rights and seniority the same as before and will not be displaced by the firemen from the absorbing line. As per former agreement dated Feb. 15, 1912.

Article 43.

The crew for light engine will consist of engineer, fireman, and pilot; the pilot to throw all switches.

Article 44.

Overtime for passenger service will be computed on basis of fifteen miles per hour.

Article 45.

Hostling will be handled by the firemen on the entire system. The same will be bulletined for ten days, and the oldest qualified fireman making application will fill the place.

Hostlers shall not be required to perform any service other than that pertaining to the care and handling of the engines under their charge, excepting that they may be called upon by the master mechanic to do switching of cars containing company materials, engine and tenders in shop yards, or to handle empty passenger cars to and from stations.

Where such work is not required to handle passengers, freight, or other trains, nor reverse car or cars in and about station yards, except in cases of emergency. When required to perform such service, they will be paid 40 cents per hour for the time consumed in such work in addition to their regular day's pay. Where any such service is performed in a day, a minimum of one hour will be allowed.

Present hostlers will not be discharged to create vacancies for firemen, but as positions become vacant through the dismissal for cause or resignation, they will be filled by firemen; this feature to be effective with January third, 1913. As per former agreement dated Feb. 15, 1912.

Article 46.

Firemen will not be required to back up at night, except in work-train service, helper service, running for water, doubling hills, wrecks, or other extraordinary cases, or where the regular service required that engines back one way.

(Note: Extraordinary cases are those which could not reasonably have been anticipated. In extraordinary cases, where practicable, firemen will be given train master's signature to back up. As per former agreement dated Feb. 15, 1912.

Article 47.

There will be side and back curtains, arm rests, and squirts hose on all engines. As per former agreement dated Feb. 15, 1912.

56

Article 48.

Firemen will not be required to fill lights at terminals, clean fires, or fill lubricators, as per former agreement dated Feb. 15, 1912.

Article 49.

The regular authorized firemen's committee will represent the firemen and hostlers in all matters that may arise between the company and the men, the officials assisting them as far as possible with company records.

Article 50.

Transportation will be furnished all B. of L. & E. men out of employment when this does not conflict with the laws of the State, subject to company's regulations, as per former agreement dated Feb. 15, 1912.

Article 51.

When engineer's board is cut on account of slack business those with less than two years' seniority will again take their turns as firemen. Those who have two years or more of seniority will lose their seniority as firemen. Those set back to firing will resume their rank as engineers in turn and will not need to be reexamined.

Article 52.

Firemen when cut off board on account of slack business will be placed back in their turn, provided they keep the master mechanic advised of their whereabouts and return within fifteen days after being notified.

Article 53.

Any promoted engineer relieved from service for dischargeable offense will not hold seniority as a fireman unless the company care to place him on board as youngest fireman.

Article 54.

When an engine in any class of service breaks down or is relieved by another engine between terminals relieving fireman will remain with his engine.

Article 56.

Deadhead crews will be considered first in on arrival at terminals, and deadheading crews deadheading away from terminals will be considered the first out.

Article 57.

Present working conditions, wages, and regulations governing Bromide and Wagoner runs will not be affected by this agreement,

but will remain in effect as at present until such time as they may be adjusted between the firemen and this company.

57 Article 58.

This contract abrogates all previous contracts and supplementary agreements. It is to be in full force from July first, 1913, and to continue in force until thirty (30) days' notice is given by either party.

For the Missouri, Oklahoma & Gulf Railway Company:

W. COUGHLIN,
*General Superintendent.*
D. SALLEE,
*Superintendent.*
G. E. PERRY,
*Superintendent Motive Power and Equipment.*

For the Brotherhood of Locomotive Firemen and Enginemen:

R. L. PRUITT, *Chairman.*
W. A. STEVENS.
A. MIKELS.

58 And afterwards, to wit, on the 21st day of November, 1916, a motion to dismiss was filed.

Said motion to dismiss, filed November 21, 1916, is in words and figures as follows, to wit:

59 In the District Court of the United States for the Western Division of the Western District of Missouri.

ALEXANDER NEW AND HENRY C. FERRIS, Receivers, Plaintiffs,
*v.*
FRANCIS M. WILSON, UNITED STATES Attorney et al., Defendants.

*Motion to dismiss.*

Now comes Francis M. Wilson, United States attorney, and moves to dismiss this case because the bill which seeks to enjoin the enforcement of the act of Congress known as the Adamson Act on the ground that it is unconstitutional and void, is without equity in that said act is valid and constitutional.

FRANCIS M. WILSON,
*United States Attorney for the Western District of Missouri, Defendant.*
By T. W. GREGORY,
*Attorney General.*
E. MARVIN UNDERWOOD,
*Assistant Attorney General.*
FRANK HAGERMAN,
*Special Assistant to the Attorney General.*

60 And afterwards, to wit, on the 22nd day of November, 1916, a final decree was filed and entered of record.

Said final decree, filed November 22, 1916, is in words and figures as follows, to wit:

61 In the District Court of the United States for the Western Division of the Western District of Missouri.

ALEXANDER NEW AND HENRY C. FERRIS, RECEIVERS, plaintiffs,
*v.*
FRANCIS M. WILSON, UNITED STATES ATTORNEY, et al., defendants.

*Final decree.*

This cause came on for hearing this November 22, 1916, upon plaintiffs' bill and motion of defendant, Francis M. Wilson, United States attorney, to dismiss, filed November 21, 1916. Said bill is now, with the consent of the court, voluntarily dismissed by plaintiffs as to all of said defendants other than said United States attorney. The court, without argument, in view of the importance of securing a prompt decision of the case by the Supreme Court of the United States, upon such consideration as it has been able to give thereto and upon the election of defendant to stand upon said motion and decline to plead further, hereby further orders, adjudges, and decrees that:

1. Said defendant's motion to dismiss the bill is overruled and denied. The act of Congress entitled "An act to establish an eight-hour day for employes of carriers engaged in interstate and foreign commerce, and for other purposes," approved September 3 and 5, 1916, is unconstitutional, null, and void, and defendant

62 Francis M. Wilson, United States attorney, is enjoined from enforcing the same against plaintiffs.

2. Plaintiffs are directed to keep from, on, and after January 1, 1917, a separate account of the moneys which would be due employes under the act if held valid, to the end that if the act is hereafter held to be valid they shall promptly pay to the employes affected the amounts due them by virtue of the act, which right can at any time be enforced herein on motion by defendant for their benefit.

Defendant then filed his assignment of errors and prayed for an appeal to the Supreme Court of the United States, which now in open court is hereby allowed. The appeal bond of defendant for $500.00, with Frank Hagerman as surety, was presented and is duly approved. Plaintiffs in open court waived the issue and service of a citation.

WILLIAM C. HOOK,
*United States Circuit Judge.*

63 And on the 22nd day of November, 1916, an assignment of errors was filed.

Said assignment of errors, filed November 22, 1916, is in words and figures as follows, to-wit:

64 In the District Court of the United States for the Western Division of the Western District of Missouri.

ALEXANDER NEW AND HENRY C. FERRIS, RECEIVER, plaintiffs,
*v.*
FRANCIS M. WILSON, UNITED STATES ATTORNEY, et al., defendants.

*Assignment of errors.*

The defendant, Francis M. Wilson, applying in open court by counsel for an appeal to the Supreme Court of the United States and presenting herewith an appeal bond, now as their assignment of errors, shows the court erred—

1. In not sustaining the motion to dismiss the bill.
2. In not entering a decree dismissing the bill.
3. In not upholding the validity of the act of Congress approved September 3 and 5, 1916, commonly known as the Adamson Act, set forth in the bill.
4. In enjoining the said defendant, Francis M. Wilson, United States attorney, as prayed in the bill.

T. W. GREGORY,
*Attorney General,*
G. CARROLL TODD,
*Assistant to the Attorney General,*
E. MARVIN UNDERWOOD,
*Assistant Attorney General,*
FRANK HAGERMAN,
*Special Assistant to the Attorney General,*
*Solicitors for Defendant.*

65 And on the 22nd day of November, 1916, an order allowing appeal was filed and entered of record.

Said order allowing appeal, filed November 22, 1916, is in words and figures as follows, to wit:

66 In the District Court of the United States for the Western Division of the Western District of Missouri.

ALEXANDER NEW AND HENRY C. FERRIS, RECEIVERS, plaintiffs,
*v.*
FRANCIS M. WILSON, UNITED STATES ATTORNEY, et al., defendants.

Be it remembered, That in the above-entitled cause, on this 22nd day of November, 1916, defendant Francis M. Wilson, United States

attorney, having made in open court his application for an appeal to the Supreme Court of the United States from the final decree of the district court, entered November 22, 1916, and having also made and filed his assignment of errors, and having in all respects conformed to the statutes and rules of the court in such cases provided:

It is ordered and decreed that the said appeal be, and the same is, hereby allowed as prayed, and the clerk of said court is hereby directed to transmit forthwith a duly authenticated transcript of the record, papers, and proceedings on which said order and decree was made and entered to the Supreme Court of the United States.

WILLIAM C. HOOK,
*United States Judge.*

NOVEMBER 22, 1916.

67 And on the 22nd day of November, 1916, a bond for appeal was filed.

Said bond for appeal filed November 22, 1916, is in words and figures as follows, to wit:

68 & 69 UNITED STATES OF AMERICA, *sct.:*

Know all men by these presents, that we, Francis M. Wilson, United States attorney for the western district of Missouri, and Frank Hagerman, are held and firmly bound unto Alexander New and Henry C. Ferris, receivers of the Missouri, Oklahoma & Gulf Railway Company, in the full and just sum of five hundred dollars to be paid to the said receivers, their heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seal and dated this 22 day of November, in the year of our Lord one thousand nine hundred and sixteen.

Whereas lately at the November term of the District Court of the United States for the western division of the western district of Missouri, in a suit depending in said court between Alexander New and Henry C. Ferris, receivers as aforesaid, plaintiffs, and Francis M. Wilson, United States attorney, defendant, judgment and decree was rendered against the said defendant and the said defendant has obtained an appeal of the said court to reverse the said judgment and decree in the aforesaid suit, and a citation directed to the said plaintiffs citing and admonishing them to be and appear in the Supreme Court of the United States sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said appellant shall prosecute said appeal to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Signed and sealed in presence of—

FRANCIS M. WILSON. [SEAL.]
FRANK HAGERMAN. [SEAL.]

The above bond is hereby approved and ordered to be filed and made a part of the record.

WILLIAM C. HOOK, *Judge.*

Citation waived and appearance in Supreme Court entered this November 22, 1916.

ARTHUR MILLER,
*Solicitor for Appellees.*

70 And afterwards, to wit, on the 22nd day of November, 1916, an election as to printing was filed.

Said election as to printing, filed November 22, 1916, is in words and figures as follows, to wit:

The opinion of the court, filed upon entry of the final decree, is as follows, to wit:

71 In the District Court of the United States for the Western Division of the Western District of Missouri.

ALEXANDER NEW AND HENRY C. FERRIS, RECEIVERS, plaintiffs,
*v.*
FRANCIS M. WILSON, UNITED STATES ATTORNEY, et al., defendants.

Now comes the attorney for the defendant and elects that the record herein be printed by the clerk of the Supreme Court of the United States.

FRANK HAGERMAN.

72 In the District Court of the United States for the Western Division of the Western District of Missouri.

ALEXANDER NEW AND HENRY C. FERRIS, RECEIVERS, plaintiffs,
*vs.*
FRANCIS M. WILSON, UNITED STATES ATTORNEY, et al., defendants.

HOOK, *Circuit Judge:*

This is an independent suit to enjoin the enforcement of a recent act of Congress, commonly called the Adamson law, upon the ground that it is contrary to the Constitution. In the character of the averments the plaintiffs' bill of complaint is stated to be typical of a number recently filed by railroad companies in various district courts of the United States. A motion to dismiss has been presented on behalf of the defendant United States attorney. The sole question raised by it is that of the constitutionality of the law. The court is informed that the other cases stand on applications for temporary injunction. An appeal from an order granting or refusing

a temporary injunction goes to the circuit court of appeals and not further by ordinary procedure, while an appeal from a final order or decree in such a case would go direct to the Supreme Court of the United States. In the former, a decision would be inconclusive; in the latter, a decision would definitely settle the question for the whole country. The motion to dismiss the case here, however it is decided, will promptly result in a final decree from which an appeal will be taken to the Supreme Court.

The assistance of this court has been invoked to facilitate a final and authoritative determination of the constitutional question. The case was presented but yesterday and a decision is desired to-day. It is far from being an agreeable duty for a judge to record a judicial conclusion without the care and deliberation essential to a con-
73 viction that he would stand to in every circumstance. Upon the merits of a case the Government neither asks nor receives from a court greater consideration than is required by the settled rules and presumptions of law, but a request by the Department of Justice to aid the progress of a case consistently with the rights of everyone can not be declined, certainly not for personal considerations.

Upon a consideration of the Adamson law and of what is said of its practical effect and what was intended to be accomplished by it, the judgment is that, as the court construes the terms of the law, it can not be sustained. Since both parties have said they would not plead further whatever the decision might be, a decree will be entered for the plaintiffs, reciting that the defendant prays and is allowed an appeal in open court. The case in which the plaintiffs were appointed receivers is in charge of the judge who is acting here. An order will be entered in that case directing plaintiffs and their counsel to cooperate with the Department of Justice in lodging the appeal in the Supreme Court by December 4th next, and in then moving for the advancement thereof for such early hearing as that court may find it consistent to grant; also to invite counsel for all railroad companies and others similarly interested in the question involved to participate in the presentation of the motion to advance and in the arguments on the merits as fully as though their clients were parties to this litigation. Though the decree of the court in the case here will be final in form, yet because of the exceptional circumstances the plaintiffs will be directed to keep their accounts and be prepared promptly to pay their employes on the basis of the Adamson law should the decree not be sustained.

WILLIAM C. HOOK,
*United States Circuit Judge.*

November 22, 1916.

74 UNITED STATES OF AMERICA, *Sct.*

I, John B. Warner, clerk of the District Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true, and com-

plete copy of the record, assignment of errors, and all proceedings in the case of Alexander New and Henry C. Ferris, as receivers of the railroad and property of Missouri, Oklahoma & Gulf Railway Company, vs. Francis M. Wilson, United States district attorney, E. C. Gray, B. C. Montpleasure, R. R. Stephens, and J. C. Morrow, in equity, No. 133, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said court.

[SEAL.] Done at office in Kansas City, Missouri, this 23rd day of November, A. D. 1916.

JOHN B. WARNER,
*Clerk U. S. District Court.*

(Indorsement on cover:) File No. 25627, W. Missouri D. C. U. S. Term No. 797. Francis M. Wilson, United States attorney for the western district of Missouri, appellant, vs. Alexander New and Henry C. Ferris, as receivers of the Missouri, Oklahoma & Gulf Railway Company. Filed November 28th, 1916. File No. 25627.

# In the Supreme Court of the United States.

OCTOBER TERM, 1916.

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FRANCIS M. WILSON, UNITED STATES attorney for the Western District of Missouri, appellant,
*v.*
ALEXANDER NEW AND HENRY C. FERRIS, as receivers of The Missouri, Oklahoma & Gulf Railway Company.

No. 797.

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*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.*

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**MOTION BY APPELLANT TO ADVANCE.**

Comes now the Solicitor General on behalf of appellant and moves the court to advance the above-entitled case for hearing upon a day as early as may suit the convenience of the court.

The suit is one brought to enjoin appellant, United States attorney for the western district of Missouri, from seeking to enforce the act approved September 3, 5, 1916 (statutes passed at 1st sess., 64th Cong., p. 721), entitled "An Act To establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes," and commonly known as the "Adamson eight-hour law."

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The court below held the act to be in violation of the Constitution of the United States and enjoined its enforcement, whereupon an appeal was taken immediately to this court.

Numerous like cases have been instituted throughout the United States and are now pending. The subject is one of such general interest and importance that all parties are deeply anxious for an early disposition of the case, and to this end the Attorney General of the United States and counsel for various railroad companies have entered into a stipulation entitled in the pending case and in form as follows:

> The Attorney General of the United States and counsel for appellees and counsel for the various railroads and receivers which have instituted proceedings to enjoin the enforcement of the so-called Adamson Law, hereby stipulate as follows:
>
> 1. For the purpose of obtaining at an early date the opinion and judgment of this court upon the questions presented by the record in this case, more especially upon the constitutionality of the said Adamson law, the appeal herein shall be prosecuted with all convenient speed and all parties will cooperate to this end, and on December 4, 1916, join the Government in asking the court that it be advanced for argument at the earliest possible date.
>
> 2. Any additional contracts or schedules under which the employees and the several railroads are now working which do not appear in the present case, but which counsel

for either side may deem to be necessary to illustrate the provisions of the act, may be submitted for consideration in the argument and presentation of the present case, provided that the opposite side is served with copies thereof not later than December 4, 1916.

3. Pending the disposition of this case all like cases now brought on behalf of the several railroads parties to this stipulation shall remain in *statu quo* and no further cases of the same or like character shall be instituted by them prior to such disposition.

4. Pending such disposition herein no prosecution shall be instituted by the United States nor any conviction sought under section 4 of said act.

5. In each pending case except this a consent order shall be entered continuing further action therein until the decision of this court, and providing that plaintiff from on and after January 1, 1917, shall keep its books and accounts in such manner that, if the constitutionality of the act is upheld, it shall ascertain the amount due to the employees affected under the construction placed upon the act by this court and shall promptly pay them said amounts, which right can at any time be enforced for their benefit on their own motion or on the motion of the defendant United States Attorney.

6. By the consent of the court appointing them, the receivers in this case, through their counsel, Arthur Miller, hereby designate Walker D. Hines, the Chairman of the Committee of Counsel representing the railroad

companies and receivers which have instituted the proceedings hereinabove referred to, as co-counsel to have charge with him of the presentation of this case for appellees in this court. Said Miller shall have complete charge of this case so far as concerns the advancement, in the efforts for which said Hines shall join.

7. Any railroad not a party hereto may become such by filing with the Attorney General of the United States notice of its concurrence in the provisions hereof.

For the Attorney General:

G. CARROLL TODD,
*Assistant to the Attorney General.*

E. MARVIN UNDERWOOD,
*Assistant Attorney General.*

FRANK HAGERMAN,
*Special Assistant to the Attorney General.*
*Solicitors for Appellant.*

ARTHUR MILLER,
*Solicitor for Appellees.*

WALKER D. HINES,
*Chairman of the Committee of Counsel of all the Railroads Aforesaid.*

In conformity to the above stipulation the opposing parties concur in this motion.

JOHN W. DAVIS,
*Solicitor General.*

DECEMBER, 1916.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1916.

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FRANCIS M. WILSON, UNITED STATES Attorney for the Western District of Missouri, appellant,
*v.*
ALEXANDER NEW AND HENRY C. FERRIS, as receivers of the Missouri, Oklahoma & Gulf Railway Co.

No. 797.

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*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.*

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## BRIEF FOR THE UNITED STATES.

### STATEMENT OF CASE.

This case presents the question of the constitutionality of the so-called Adamson eight-hour law (Sept. 3 and 5, 1916, c. 436, 39 Stat., 721). The suit was instituted in the District Court for the Western District of Missouri by the receivers of the Missouri, Oklahoma & Gulf Railway Company against Francis M. Wilson, United States attorney, and certain employees of the railway company to enjoin the enforcement of the law and the rights of said employees arising thereunder upon the ground that the law is

unconstitutional because, it is alleged, it deprives the complainants of liberty of contract and takes their property without due process of law; it is experimental, unworkable, and not a regulation of interstate commerce; the classification therein made is unjust, unreasonable, and arbitrary, and the penalty clause so drastic as to prevent an orderly resort to the courts for a just determination of complainants' rights.

The bill was voluntarily dismissed by complainants as to all defendants except the United States attorney. The latter filed a motion to dismiss the bill upon the ground that the law was constitutional and the bill without equity. The case was submitted, without argument, upon bill and motion to dismiss to Circuit Judge Hook, sitting as district court, who, for the purpose of facilitating an early decision of the case by this court, and "without the care and deliberation essential to a conviction that he would stand to in every circumstance" (R., p. 53), entered a final order overruling the motion and enjoining the enforcement of the law upon the ground that it was unconstitutional. An appeal was taken immediately, upon which the case, under section 238 of the Judicial Code, comes direct to this court.

In order to avoid the trial of a great number of like suits which had been filed throughout the United States, a stipulation, copy of which appears as Appendix A (p. 59) to this brief, was entered into between the railroads and the Government, whereby it was agreed that the present case should be made the test case for the purpose of determining the constitutional-

ity of the law, and that certain typical schedules of other railroads might be filed in this court and referred to in argument for the purpose of illustrating the applicability of the law under varying conditions.

## THE STATUTE.

An Act To establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the act of February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate commerce," as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, from any State or Territory

of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States: *Provided*, That the above exceptions shall not apply to railroads though less than one hundred miles in length whose principal business is leasing or furnishing terminal or transfer facilities to other railroads, or are themselves engaged in transfers of freight between railroads or between railroads and industrial plants.

SEC. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; that each member of the commission created under the provisions of this Act shall receive such compensation as may be fixed by the President. That the sum of $25,000, or so much thereof as may be necessary, be, and hereby is, appropriated, out of any money in the United States Treasury not otherwise appropriated, for the necessary and proper expenses

incurred in connection with the work of such commission, including salaries, per diem, traveling expenses of members and employees, and rent, furniture, office fixtures and supplies, books, salaries, and other necessary expenses, the same to be approved by the chairman of said commission and audited by the proper accounting officers of the Treasury.

SEC. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

SEC. 4. That any person violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not less than $100 and not more than $1,000, or imprisoned not to exceed one year, or both.

Approved, September 3, 1916.

Approved, September 5, 1916.

(C. 436, 39 Stat. 721.)

**SPECIFICATION OF ERROR.**

The assignments of error appear on page 50 of the record. They allege that the court erred in holding the law unconstitutional and in not sustaining the motion to dismiss the bill.

## ARGUMENT.

The sole question presented in this case is the constitutionality of the act. The Government maintains (A) that the law is authorized by paragraph 3 of section 8 of Article I of the Constitution, and (B) that it does not conflict with any of the limitations upon the power of Congress prescribed in the Constitution.

### A.

### LAW AUTHORIZED UNDER GRANT TO CONGRESS OF POWER "TO REGULATE COMMERCE WITH FOREIGN NATIONS, AND AMONG THE SEVERAL STATES, AND WITH THE INDIAN TRIBES."

The power exerted by Congress in the enactment of this law was authorized by the commerce clause of the Constitution, whether it be considered as (I) a law limiting the hours of labor of the persons affected or (II) merely as an undertaking to regulate the wages to be received by them.

### I.

### THE ACT IS CONSTITUTIONAL AS AN HOURS OF SERVICE LAW.

It has already been decided by this court that Congress possesses the power to enact hours of service laws.

> The fundamental question here is whether a restriction upon the hours of labor of employees who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation

> to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. *Chicago, Burlington & Quincy Railroad Company* v. *McGuire*, 219 U. S. 549. (*Baltimore & Ohio R. R.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618–619.)

This court has also held that the power over interstate commerce "is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States" (*Gibbons* v. *Ogden*, 9 Wheat. 1, 197), and that "the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations." (*Hoke* v. *United States*, 227 U. S. 308, 323.)

Justice Harlan, in the dissenting opinion in the case of *Lochner* v. *New York*, 198 U. S. 45, 72, said, "We also judicially know that the number of hours that should constitute a day's labor in particular occupations involving the physical strength and safety of workmen has been the subject of enactments by Congress and by nearly all of the States. Many, if not most, of those enactments fix eight hours as the proper basis of a day's labor."

This court has considered some of these eight-hour laws and has sustained them, thereby holding that the legislative bodies did not abuse their discretion in limiting work to eight hours. (*Holden* v. *Hardy*, 169 U. S. 366; *Ellis* v. *United States*, 206 U. S. 246; *Muller* v. *Oregon*, 208 U. S. 412; *Bosley* v. *McLaughlin*, 236 U. S. 385; *Miller* v. *Wilson*, 236 U. S. 373.) Since the occupations of the employees affected by the Adamson law are of similar character, there can be no doubt that Congress was well within its legislative discretion in prescribing eight hours as the proper limitation of the hours of labor of employees engaged in work so hazardous both to the traveling and shipping public and to the employees themselves. (*Baltimore and Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618.) See Appendix B (p. 62).

We are not here concerned, therefore, to show congressional power to pass an hours-of-service law, but only to establish that the Adamson law is an hours-of-service law.

Such laws may be absolute in their terms, forbidding any service whatsoever beyond the limita-

tion provided or they may authorize excess service in exceptional circumstances. In all, provision is made for a definite number of hours of labor, but they differ with respect to penalties and exceptions permitted. Comparatively few impose an absolute limitation upon hours of service, but each contemplates as strict limitation as is reasonably compatible with the conditions affected.

For example, the "Hours of Service Act," which limits the hours of labor of train dispatchers and trainmen to 9 and 16 hours, respectively, provides:

> * * * That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains. (Act of Mar. 4, 1907, c. 2939, sec. 3, 34 Stat. 1415, 1416.)

Other examples may be found in the table which is attached to this brief as Appendix C (p. 72), and which sets forth a brief analysis of hours-of-service laws, showing the exceptions permitted, if any.

From these it will be seen that the Adamson law differs only in degree of rigidity from other laws of this character. It recognizes the present impracticability of an absolute eight-hour day in railroad service, but seeks to put such day into effect whenever and to the extent conditions permit.

The claim that this act is not an hours-of-service law, but only a regulation of wages, is not supported by the facts. The act itself and its legislative history, we maintain, show that it was the intent of Congress to approximate a substantial eight-hour day.

The act is entitled "An Act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes," and section 1 provides that "eight hours shall, in contracts for labor and service, be deemed a *day's work* and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees," etc. (R., p. 7). The President in his message to Congress recommended "the establishment of an eight-hour day as the legal basis alike of *work* and of wages," etc. He further stated that he "proposed that the eight-hour day be adopted by the railway managements and put into practice for the present as a substitute for the existing ten-hour basis of pay and *service*." (R., p. 20.) (All italics ours.)

Mr. Adamson, the chairman of the committee reporting the bill to the House, in presenting the bill said:

> Mr. ADAMSON. * * * The eight-hour law is nothing new in this country, on the idea of safety for people and property on trains. The people who operate the trains, it is contended, ought to be in the full possession of all their faculties of mind and body, and if they work only eight hours a day except in cases of emergencies, which is the

practice, then they would be in the full possession of their faculties; and on that theory we have legislated for hours of service. We have 16 hours and we have 9 hours, and if a train may be in the middle of a wilderness when 16 hours arrive, there are only certain conditions which forbid their being taken off the train and the train stopped. We have heretofore touched the subject. We are only going a little further with it, and saying it is safer to make it eight hours. But we are not going any further than that. * * *. (53d Cong. Rec., part 13, p. 13584.)

Mr. ADAMSON. If the gentleman will be as honest as I am, he will vote for this bill, because I believe that in the case of people operating trains the eight-hour law is right for public safety, and it being right, and civilization recognizing it as right, and as that naturally will probably avert a strike, I think it is honest for people to vote for it and avert a strike. (Idem, p. 13584.)

Mr. ADAMSON. * * * In the first place it is not true that the act fixes wages. That statement is gratuitous and inconsiderate. The law fixes an 8-hour day. We had previously a 16-hour day and a 9-hour day. We now have an 8-hour day. The only reference to wages is in the language used to hold in statu quo until the workings of the eight-hour law could be observed and all other features of the service adjusted to the eight-hour law. (53d Cong. Rec., part 15, p. 2137.)

* * * * * * *

Mr. ADAMSON. * * * The eight-hour law will be supported by the American people.

> It has been discussed for years; it would pass both Houses of Congress by an overwhelming majority at any time for train operatives; in fact, Congress has already enacted the eight-hour law for all Government work, and the vote on the Clark resolution for all employees on railroads showed the strength of the sentiment in favor of an eight-hour law for everybody, but we did not insist on it for anybody but train operatives; we could agree on that; we understood it; everybody knows what it means; and we then provided for the investigation as to the effect of the eight-hour law on the operation of a railroad. Then we will enact whatever else is necessary. (Idem, p. 2138.)

Senator Newlands, chairman of the Committee on Interstate Commerce, in presenting the bill to the Senate, said:

> The second recommendation of the President was "the establishment of an eight-hour day as the legal basis alike of work and of wages." That recommendation we have endeavored to meet in the measure which has been now reported. (53d Cong. Rec., part 13, p. 13553.)

On the same subject Senator Stone said:

> Mr. President, I can not read section 1 of the House bill 17700 without concluding that under the terms of that section it is intended to make the eight-hour day provision permanent. * * * The hours of labor are fixed—at least, the standard labor day is fixed—in the first section of this bill. I re-

> gard that section as undertaking to fix that much permanently, and if that be not so, then it ought to be so. (Idem, p. 13647.)

The Congressional Record shows that this view was many times expressed during the debates on the bill.

Furthermore, the enactment of this law came as the culmination of the earnest and insistent demand of the railroad employees for shorter hours, and the history of the movement for an 8-hour day, which had its beginning many years ago, shows that it is aimed primarily at reduction of hours and not increase of wages. Formerly, railroad employees were paid by the trip, regardless of actual hours of labor. As commerce grew and became more complex, trains became longer and heavier and traffic became more and more congested. Consequently, the movement of trains between terminals became slower and required more hours than theretofore. Under the old system, employees were required, for the same wage, to cover the same distance, though a greater number of hours was required. The lengthening of hours of labor attendant upon these changed conditions became a menace to the employees and the public. To illustrate the extreme to which the abuse went, Mr. Garretson, in his statement at the hearing on the Adamson bill before the Senate Committee on Interstate Commerce, said:

> In my own experience I have remained on duty absolutely without any form of rest, time after time, for 72 hours. (Hearing before

Senate Committee, Senate Document No. 549, 64th Cong., 1st sess., p. 26.)

The experience of Mr. Warren S. Stone, grand chief of the Brotherhood of Locomotive Engineers, was the same.

> Gentlemen, I have been in the cab of a locomotive many hours. I know the infinitesimal fraction of a second that spells the difference between safety and disaster. I know what it means for a man working under stress of long hours. I have stood on the deck of a locomotive 60 and 70 hours, and I know the condition I was in, and I know I was not safe, * * *. (Idem, p. 146.)

A table showing the relation between excessive hours of labor and accidents, which formed a part of the House committee report on the 16-hour law, is attached to this brief as Exhibit D (p. 77).

The 16-hour law was enacted to remedy this great evil, and it is interesting to note that arguments now made against the 8-hour law are practically the same as those advanced in opposition to the 16-hour law. (40 Cong. Rec., part 10, pp. 9361, 9362; 41 Cong. Rec., part 1, pp. 760, 762.)

As another step in the movement toward the 8-hour day, agreements were, about 1907, perfected between the railroads and their employees whereby the present 10-hour standard day was adopted. This standard is expressed as follows: "One hundred miles or less, ten hours or less, shall constitute a day."

This 10-hour standard day is in effect upon practically all of the railroad lines in the United States

except the seventeen railroads set out in Appendix E, page 80 of this brief, which already have the eight-hour or shorter standard day.

About a year ago, the employees presented, in their Form No. 35 (R., p. 17), demands for a change of the 10-hour standard day. This demand, in substance, required the substitution of an 8-hour for the former 10-hour day, and provided that the minimum speed of trains should be raised from 10 to 12½ miles an hour, so that the new standard day would be expressed as follows: One hundred miles or less, eight hours or less, shall constitute a day. Of this form, No. 35, Mr. Garretson, in the statement previously referred to, said:

> While it has much language, when you strip it of the various provisions there is *only one basic proposition* in it, and that is the demand for *the eight-hour day* for the men represented by the brotherhoods, and *to make that effective and to render it uneconomic to work men on long hours we demanded time and a half for every hour of work in excess of the time required to complete a trip at an average speed of 12½ miles per hour.* Bear in mind that to us mileage and hours are interchangeable. Therefore, while they now pay pro rata overtime there is no incentive to shorten the hours if they can make money by using us on long hours. It is a penalty clause which makes the eight-hour day a thing that is worth while to observe. (Hearing before Senate Committee, S. Doc. No. 549, 64th Cong., 1st sess., p. 37.) [Italics ours.]

We submit, therefore, that the desire of the employees was for an act to shorten their hours, that it was Congress's intention to pass such an act, and that the provisions of the act actually passed show an earnest effort to establish as effective an eight-hour day as conditions would permit.

The difference between the Adamson law and other laws of like character is one of degree and not of principle. The elasticity of its provisions was designed to facilitate the readjustment of present railroad conditions to the eight-hour day, and the carriers should not complain, because the law is made as easy as possible for them. The liberality of requirement does not change the nature of the law nor affect its constitutionality.

The law permits overtime work whenever the employer considers such excess service necessary, but the penalty of payment for overtime service is imposed in order to enforce obedience to the eight-hour provision as far as practicable. The effectiveness of the penalty may be forecast by the strenuousness of the objections thereto.

The natural tendency of this law will be to make the employers use every effort to limit the hours of service to eight. The employees claim that this may be accomplished, in great measure, by increased administrative and economic efficiency, particularly by increasing the minimum speed from an average of 10 to 12½ miles per hour. Mr. Elisha Lee, chairman of the national conference committee of the railways,

seems to concede this in his statement made at the hearings upon the bill before the Senate committee:

> Senator THOMPSON. Reduced to its simple form, is not the contention of the railroad men to make this run in 8 hours instead of 10; and if they can do it, there would be no increased cost, would there?
>
> Mr. LEE. If we could get them over the road in 8 hours I do not think there would be any increase—that is, to their 4 [8] hours the same as the 10. But we are up against the conditions. On many of these roads thay can not get over in 10 hours, in a good many instances, on account of congestion. There are heavy trains go over in 9 or 10 hours. But if this is put in and they attempt to run on a 12½-mile speed basis it would mean a reduction in the train, which would mean an additional number of trains; the reduction in the size of the train would mean an additional number of trains to run and that means additional facilities and all that goes with it. (Hearing before Senate Committee, S. Doc. No. 549, 64th Cong., 1st sess., pp. 91–92.)

We submit, therefore, that the Adamson law is an hours-of-service law and comes within the authority of the case of *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612.

## II.

### THE ACT IS CONSTITUTIONAL, EVEN IF ONLY A WAGE LAW.

If the Adamson law were only an act regulating the wages of employees engaged in interstate commerce, as claimed by the railroads, it would still

be within the power delegated to Congress in the commerce clause of the Constitution. The decisions of this court can lead to no other logical conclusion.

From the beginning, Congress's power over interstate commerce has been declared to be supreme.

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. * * * If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. (*Gibbons* v. *Ogden*, 9 Wheat., 1, 196–197, as quoted in *The Employers' Liability cases*, 207 U. S. 463, 493.)

This power consists of "direct supervision, control, and management" (*In re Debs*, 158 U. S. 564, 578), and extends to the regulation of employees while engaged in interstate commerce.

> Among the instruments and agents to which the power extends are the railroads over which transportation from one State to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees. (*Second Employers' Liability cases*

223 U. S. 1, 47; see also *Sherlock* v. *Alling*, 93 U. S. 99, 103; *Cooley* v. *Board of Wardens*, 12 How. 299, 316.)

It has also been held that the power extends to the regulation of the relations of common carriers and their employees while both are engaged in interstate commerce.

> It can not be said that because a regulation adopted by Congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power would be but to concede the power and then to deny it, or at all events to recognize the power and yet to render it incomplete. (First *Employers' Liability Cases*, 207 U. S. 463, 495.)
>
> In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate commerce, *may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce*, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have *a real or sub-*

> *stantial connection with the interstate commerce* in which the carriers and their employees are engaged. (*Second Employers' Liability Cases*, 223 U. S. 1, 48–49.) (Italics ours.)

Since the above principles have been definitely settled by this court, it only remains to be determined in this case whether the control and regulation of the wage agreement between carrier and employees while both are engaged in interstate commerce have "a real or substantial connection with the interstate commerce."

Among the relations which have been held to have substantial connection with interstate commerce are those regulated in the following laws: Hours of service act (*Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612); safety-appliance acts (*Johnson* v. *Southern Pacific Co.*, 196 U. S. 1); employers' liability act (*Second Employers' Liability Cases*, 223 U. S. 1); act prohibiting payment of seamen's wages in advance (*Patterson* v. *Bark Eudora*, 190 U. S. 169).

These authorities, in principle, establish the proposition here maintained by the Government. But apart from these precedents and in reliance upon the facts presented in this case, we submit that the wage regulation here involved has substantial connection with interstate commerce, because its natural tendency is to keep open the channels of interstate commerce and render such commerce safer and more efficient.

The carrier engaged in interstate transportation is "in the exercise of a sort of public office, and has public duties to perform." The exercise of its franchise is permitted "primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation." (*Donovan* v. *Pennsylvania Company*, 199 U. S. 279, 292, 293.) The chief duty of railroads is to carry. This is "the ultima ratio of their existence," and they must put themselves in a position to carry promptly and efficiently and at reasonable rates. (*People* v. *New York Central*, etc., 28 Hun. 543, 553.)

The duty to carry is absolute, and the fact that, under particular circumstances, this duty can be preformed only at increased expense is no excuse.

> The duties imposed must be discharged at whatever cost. They can not be laid down or abandoned or suspended without the legally expressed consent of the State. (*People* v. *New York Central*, etc., 28 Hun. 543, 558, 559.)
>
> If they can not get labor to perform such duties at what they offer to pay, then they must pay more, and as much as is necessary to get it. (*Loader* v. *Brooklyn Heights Co.*, 35 N. Y. Supp. 996, 997.)
>
> This is so (the distinction) because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. (As quoted from *Atlantic Coast Line* v. *North Carolina Corp. Com.*, *206* U. S. 1, 26, in *Missouri Pacific Ry. Co.* v.

*Kansas*, 216 U. S. 262, 278); see also, *Oregon Railroad and Navigation Co.* v. *Fairchild*, 224 U. S. 510, 529; *State* v. *Florida, etc., Co.*, 69 Fla. 165, 183, Beale and Wyman, Railroad Rate Regulation, 1st ed., sec. 274.

A strike, without violence, will not justify the carrier in abandoning, even temporarily, the performance of its public functions.

> The respondents had a lawful right to take their ground in respect to the price to be paid, and adhere to it, if they chose; but if the consequence of doing so were an inability to exercise their corporate franchises to the great injury of the public, they can not be heard to assert that such consequence must be shouldered and borne by an innocent public, who neither directly nor indirectly participated in their cause. * * *
>
> These facts reduce the question to this: Can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employees over the cost or expense of doing them? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They can not be laid down or abandoned or suspended without the legally expressed consent of the State. The trusts are active, potential, and imperative, and must be executed until lawfully surrendered; otherwise a public highway of great utility is closed or obstructed *without any process recognized by law*. This is something no public officer charged with the same trusts and duties in regard to other pub-

lic highways can do without subjecting himself to *mandamus* or indictment. (*People* v. *New York Central, etc.*, 28 Hun. 543, 558); see also *Blackstock* v. *New York and Erie R. R. Co.*, 20 N.Y. 48; *Pittsburgh, etc., Ry. Co.* v. *Hazen*, 84 Ill. 36; *Central Railroad and Banking Co.* v. *Georgia Fruit and Vegetable Exchange*, 91 Ga. 389; *Loader* v. *Brooklyn Heights Ry.*, 35 N. Y. Supp. 996; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262.

It is the duty of the Federal Government to see that the interstate carrier performs its public duty.

> The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control. (*In re Debs*, 158 U. S. 564, 586.)

To accomplish this and to prevent interference with interstate commerce, the Government may exert the full power of the Nation, against sovereign States as well as against individuals. (*In re Debs*, 158 U. S. 564, 582; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1.)

The nature of the interference is immaterial. State laws may be nullified (*McDermott* v. *Wisconsin*, 228 U. S. 115); obstructing bridges or piers removed (*Greenleaf Johnson* v. *Garrison*, 237 U. S. 251); mere

agreements restraining trade forbidden (*Northern Securities Co.* v. *United States*, 193 U. S. 197); and boycotts declared illegal (*Loewe* v. *Lawlor*, 208 U. S. 274). On the other hand, wide legislative discretion is permitted in the enactment of laws for the promotion of commerce. The employer's liability has been fixed and declared (*Second Employers' Liability Cases*, 223 U. S. 1); full crews required (*Chicago, R. I. and Pac. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *St. Louis, etc. Ry.* v. *Arkansas*, 240 U. S. 518); qualifications of employees prescribed (*N. C. & St. L. Ry.* v. *Alabama*, 128 U. S. 96); rate of wages of pilots fixed (*Cooley* v. *Board of Wardens*, 12 How. 299; *Ex parte McNiel*, 13 Wall. 236); the terms of contract between employer and employee regulated (*Patterson* v. *Bark Eudora*, 190 U. S. 169; *Robertson* v. *Baldwin*, 165 U. S. 275; *McLean* v. *Arkansas*, 211 U. S. 539; *Erie R. R. Co.* v. *Williams*, 233 U. S. 685); and, as here claimed, the wage relation between employer and employee.

Whether looked at from the standpoint of promoting commerce or removing obstructions to its free flow, the regulation of wages bears a close relation to the proper performance by carriers of their public duties.

The efficiency and safety of railroad service depend upon the skill and physical fitness of the employees. It is just as necessary to properly care for employees as to keep in good condition the physical instrumentalities used in interstate commerce. Physical efficiency is impossible without proper living conditions, which demand suitable food, clothing, hous-

ing, rest, and recreation. These, in turn, can not be secured without the payment of an adequate wage. An adequate wage, therefore, is essential to safe, regular, and efficient service in interstate commerce, and the public, through Congress, has a right to demand its payment. Wages if reduced below present standard would be inadequate. (Appendix F, p. 81.)

> In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. (*C. B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 570.)

On the other hand, the public is interested in preventing the payment of wages which are too high, since they constitute the largest element in the cost of transportation and necessarily affect rates. An unreasonably high wage means an unjust rate or impaired service. In either event, it is the public that pays, and the public has the right to demand the regulation of wages to the end that it may enjoy reasonable and just rates.

But wage regulation has a still more vital connection with interstate commerce. Disputes about wages may be, and frequently are, the cause of interference with or entire stoppage of the flow of interstate commerce.

Strikes are the usual weapon of labor to enforce its demands. When effective, they block the channels of commerce as completely as if physical ob-

structions were placed in the way or parts of its lines removed. In fact, nothing could interfere more seriously with interstate transportation than a general strike like the one recently threatened.

It will be remembered that in October, 1910, the French Republic faced a general strike upon the railroads of that country. Acts of violence were prevalent and cities and towns threatened with famine. Food prices went up and conditions soon became intolerable. The French Government proclaimed the principle "that public servants must be required to discharge their duties regularly and without interruption," and by means of military mobilization put down the strike within a few days.

Such a condition, only greatly exaggerated because a larger and more populous territory was involved, faced this country at the time the Adamson law was enacted. The President realized the gravity of the situation and in his message to Congress recommending the passage of a remedial law said:

> The freight service throughout the United States must stand still until their places are filled, if, indeed, it should prove possible to fill them at all. Cities will be cut off from their food supplies, the whole commerce of the Nation will be paralyzed, men of every sort and occupation will be thrown out of employment, countless thousands will in all likelihood be brought, it may be, to the very point of starvation, and a tragical national calamity brought on, to be added to the other distresses of the time, because no basis of accommodation or settlement has been found. (R., p. 19.)

That Members of Congress viewed the situation in like manner is shown by similar expressions in the debates upon the bills pending in Congress.

This grave danger to interstate commerce was not an isolated but has been a recurring one. Time and again threatened strikes have endangered different sections of the country. The attention of the thoughtful, therefore, has been directed to the solution of the problem. One of the most notable contributions to the subject is the report of the board of arbitration, dated November 2, 1912, in the controversy between 52 eastern railroads and the Brotherhood of Locomotive Engineers. This board consisted of the following able men: Charles R. Van Hise, Oscar Straus, Frederick N. Judson, Albert Shaw, Otto M. Eidlitz, Daniel Willard, and P. H. Morrisey. In this report the situation that faced the country then was thus described:

> In short, a general strike on the railroads for a great section of the country would have paralyzed the industries of that section; and, even if food were obtainable, millions of laboring people would have felt the pinch of want. If a strike of the character indicated lasted only for a single week, the suffering would have been beyond our power of description; and if it had continued for a month, the loss, not only in property, but in life, would have been enormous. Also, as usual in such cases, the disaster would have fallen most heavily upon those least able to bear it. (Locomotive Engineers Arbitration, 1912, p 92.)

In view of the gravity of the question, the board went beyond a mere finding in the particular case and made recommendations with respect to a solution of the problem.

Realizing, as they said, that "the balance of power in the control of wages, which was first with the railroads, has now passed to organized railway labor" (Idem, p. 89), and that "from the viewpoint of the public it is an intolerable situation when any group of men, whether employees or employers, whether large or small, have the power to decide that a great section of the country as populous as all of France shall undergo great loss of life, unspeakable suffering, and loss of property beyond the power of description, through the stoppage of a necessary public service" (Idem, p. 97), the board made the following recommendation:

> The above-mentioned disparity of status suggests the creation of national and state wage commissions or labor commissions, which should exercise functions regarding labor, engaged at work in public utilities, analogous to those now exercised with regard to capital by the public service commissions already in existence.
>
> * * * * *
>
> Above all, the wage commissions proposed would represent the public. They would work in cooperation with the Interstate Commerce Commission and thus secure to railway employees just wages; and this without regard to whether the employees are fully organized. Under the existing situation, well-organized railway labor, illustrated by engineers, firemen,

> conductors, trainmen, etc., receive consideration from railroads not accorded to the classes of labor that are not so well organized. (Locomotive Engineers' Arbitration, 1912, Report of Board, pp. 104, 105–106.) See also Report on the Chicago Strike, 1894, by U. S. Strike Commission, p. L.

In the Adamson law the idea of the board of arbitration has been adopted, though the regulation is accomplished by direct action of Congress rather than through the instrumentality of a commission. And by this regulation of the wage relation and the hours of service of railroad employees a disastrous strike was averted and the channels of interstate commerce kept open.

Surely, Congress's power over interstate commerce, which has been so many times declared to be supreme, is, in the face of an interference greater than any other that can be imagined, ample enough to authorize the assumption of "direct supervision, control, or management" over the wage relation of persons engaged in such commerce.

> Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. (*McDermott* v. *Wisconsin*, 228 U. S. 115, 128.)

If this be true there certainly falls within that power the right to take all steps necessary to put down a strike or prevent an impending one. The

public functions of the carrier, upon the performance of which depend not only the happiness and comfort of the people but even their lives, demand such regulation by Congress as will adequately protect the free flow of interstate commerce.

We submit that this relation between master and servant has not only substantial but vital connection with interstate commerce, in which both are engaged. The regulation of this relation, therefore, falls clearly within the authority of the *Second Employers' Liability Cases*.

> As is well said in the brief prepared by the late Solicitor General: "Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad con-

ditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act." (*Second Employers' Liability Cases*, 223 U. S. 1, 48.)

It is not easy to imagine any branch of the relations between carriers and their employees, in so far, at least, as both are actually engaged in interstate commerce, which does not fall within the principles above announced. If any such there are, surely wage agreements and contracts of employment can not be so classified. Those inducements which are offered on the one side to persuade men to such labor, and those engagements which measure the labor to be performed on the other, are certainly connected in the most intimate and inseparable fashion with the act of commerce itself. Nor must it be overlooked that if Congress is declared to be impotent to deal with them, similar reasoning will exclude the power of the States as well, and thus place such agreements beyond all reach of law.

## B.

### THE LAW DOES NOT CONFLICT WITH ANY OF THE LIMITATIONS UPON THE POWER OF CONGRESS PRESCRIBED IN THE CONSTITUTION.

Having established, we submit, that the Adamson law falls within the power delegated to Congress in the commerce clause, we proceed now to show that none of the limitations upon this power found elsewhere in the Constitution affects the validity of the statute.

### I.

#### THE LAW DOES NOT DEPRIVE THE CARRIERS OF LIBERTY OF CONTRACT NOR TAKE PROPERTY WITHOUT DUE PROCESS OF LAW.

If Congress has power to regulate the hours of labor and the wage relation of persons engaged in interstate commerce, the fact that some contracts are interfered with is immaterial and not forbidden by the Fifth Amendment. This principle has been so often decided and so fully discussed by this court that we submit the question in the words of the following decisions:

> The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern, as for example the regulation of commerce with foreign nations and among the several States. (*C. B. & Q.* v. *McGuire*, 219 U. S. 549, 567.)
>
> And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. *Chicago, Burlington &*

*Quincy Railroad Company* v. *McGuire*, 219 U. S. 549. (*Baltimore & Ohio* v. *Interstate Commerce Commission*, 221 U. S. 612, 619.)

Long before the above cases were decided it was said in *Knox* v. *Lee*, 12 Wall. 457, 550, 551, that "as in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the Sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to the defeat of legitimate government authority."

"These principles control the decision of the present question. The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. (*Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 482); see also *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 202, 203, *Second Employers' Liability Cases*, 223 U. S. 1, 52.

The same principle holds with reference to the taking of property without due process of law.

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. (*C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593.) See also *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Greenleaf Johnson* v. *Garrison*, 237 U. S. 251.

We have heretofore shown that the enactment of the Adamson law was within the power of Congress. Therefore, without repeating the argument, the Government maintains that, under the above decisions, the alleged infringement of the right of contract does not affect the validity of the law.

The assertion now made that Congress enacted this law from improper motives and upon insufficient information can have no bearing upon its constitutionality. "It is always a presumption that the legislature acts within the scope of its authority." *Miller* v. *United States*, 11 Wall., 268, 309.

The motives of Congress, when acting within its constitutional power, may not be challenged or reviewed. Nor will this court undertake to say whether any or sufficient information was before Congress. This is clearly a matter and responsibility of the legislative branch of the Government, and the judiciary may not pass judgment thereon.

> The decisions of this court from the beginning lend no support whatever to the assump-

tion that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said, from the beginning no case can be found announcing such a doctrine, and on the contrary the doctrine of a number of cases is inconsistent with its existence. (*McCray* v. *United States*, 195 U. S. 27, 56.)

But it is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts can not inquire how the legislature obtained its knowledge. *They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action.* (*Chesapeake & Potomac Telephone Company* v. *Manning*, 186 U. S. 238, 245.) (Italics ours.)

It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the Government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. (*McCray* v. *United States*, 195 U. S. 27, 55.)

This principle is stated with emphasis in the Northern Securities case.

> So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. Harm and only harm can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases, or because the rule, in its operation, may possibly affect the interests of business, is to endanger the safety and integrity of our institutions and make the Constitution mean not what it says but what interested parties wish it to mean at a particular time and under particular circumstances. The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in *United States* v. *Lee*, 106 U. S. 196, 220, is the only supreme power in our system of government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the Government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution. If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it did not so declare. But if nothing more can be said than that Congress has

> erred—and the court must not be understood as saying that it has or has not erred—the remedy for the error and the attendant mischief is the selection of new Senators and Representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law. (*Northern Securities Co.* v. *United States*, 193 U. S. 197, 350.) [Italics ours.]

The argument of appellees in support of their contention of this phase of the case may be stated and completely answered in the following words of Mr. Chief Justice White:

> It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the Government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the Government of its lawful

powers is to be corrected by the abuse of its powers by another department.

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the Government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. (*McCray* v. *United States*, 195 U. S. 27, 54–55.)

## II.

### THE CLASSIFICATIONS MADE IN THE ACT ARE NOT ARBITRARY.

This court has repeatedly held that the legislative body possesses wide discretion in classifying the objects affected by the laws enacted, and that it may adopt any classification which is not wholly arbitrary or unreasonable.

> We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary and is uniform within the class, it is within such discretion. (*Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235); see also *Louisville & Nashville* v. *Melton*, 218 U. S. 36, 55, and cases cited.

The classifications made by Congress in the Adamson law fall clearly within this ruling.

The law is made to apply to "all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the act of February fourth, eighteen hundred and eighty-seven, * * * and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on" said railroads in interstate commerce.

Practically identical classifications in other laws have been upheld by this court.

A limitation of the application of the hours-of-service act to railroad employees actually engaged in the operation of trains was upheld by this court in the case of *Baltimore and Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612.

With respect to the classification of railroads, this court has upheld exceptions excluding from the law's operation railroads of short mileage—

> whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, *or according to the simpler and more constant test of the length of the line of the railroad*, is a matter within the discretion of

> the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws. (*Dow* v. *Beidelman*, 125 U. S. 680, 691, as quoted with approval in *Chesapeake & Ohio Ry.* v. *Conley*, 230 U. S. 513, 522.) [Italics ours.] See also *St. Louis, etc., Ry.* v. *Arkansas*, 240 U. S. 518.

Likewise the exclusion of electric railroads from the law's requirements has been upheld:

> The exception of "electric lines and street railways" is also made the ground of criticism, but this classification rests upon reasonable and familiar distinctions, long recognized as proper in railroad legislation. *Omaha & Council Bluffs Street Railway Co.* v. *Interstate Commerce Commission, ante*, p. 324. (*Chesapeake and Ohio Ry.* v. *Conley*, 230 U. S. 513, 524.)

In view of the above decisions, it can hardly be seriously contended that the classifications made in this act were arbitrary and in violation of the provisions of the Constitution.

## III.

### THE ACT IS WORKABLE.

It is claimed that the act is unconstitutional because incapable of application to the subject matter with which it deals and because no standards are provided whereby carriers can know how to comply with the act.

Disregarding for the present section 3 of the act, which will be considered separately, all the allegations of unworkability are based upon the alleged impossibility of adjusting the requirements of the law to present agreements and schedules.

Even if this were true, it is immaterial, because such agreements, as we have heretofore seen, must yield to the law.

If existing agreements are disregarded, there can be no doubt that the law may be, without difficulty, literally enforced. If the law provided an absolute eight-hour day limitation, no one would doubt that the employee would have to leave his train at the expiration of eight hours. It would seem equally simple to ascertain the expiration of the eight-hour period for the purpose of determining when overtime pay should commence.

Independently, then, of present agreements and the effect of section 3 it is a simple matter to adjust the requirements of the law to the subject matter with which it deals. The hardship, if any, that may result from its operation is a matter for legislative, not judicial, consideration.

> * * * where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with

> the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. (*Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 569); see also *McLean* v. *Arkansas*, 211 U. S. 539, 547; *St. Louis, etc., Ry.* v. *Taylor*, 210 U. S. 281, 295.

But it is not necessary to set aside these agreements, since only a slight modification will make them easily adjustable to the requirements of the law. This will appear from a consideration of the act itself and of the agreements affected by it.

The act provides that "eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed" by certain interstate carriers.

The law therefore prescribes eight hours as the maximum period, in any given day, which the employer may work the employee without becoming subject to penalty of pay for overtime service and makes such period the measure or standard for reckoning the compensation.

The act itself and the circumstances surrounding its passage show that it was intended to decrease and not to increase the hours of service of employees and to temporarily maintain their existing wage as minimum compensation. The law, therefore, while applicable to all employees, only becomes operative when the circumstances of the employment extend the hours of labor of the employee beyond the eight-hour period or reduce his compensation below the minimum prescribed in section 3. For example, the law is applicable to, but not, except in unusual circumstances, operative upon the employees of carriers which have already adopted the eight-hour standard day and certain classes of employees, like passenger engineers and firemen, who have, by agreement, a shorter day. As long as these agreements confine service and compensation within the maximum and minimum provided in the act, they will remain unaffected by it, and there can arise no question of the workability of the act with respect thereto.

This was clearly the construction placed upon the law by the carriers, the employees, and by Congress.

> Senator BRANDEGEE. Mr. Sheean, let me ask you this: You appear to be familiar with this business. This bill on the first line of the first page proposes to make these provisions apply to the passenger as well as to the freight traffic. There has been nothing said about the passenger traffic. What effect would it have on it if this bill were passed; what is the necessity for applying it to the passenger traffic? Are

there more than eight-hour runs in the passenger service of the country?

Mr. SHEEAN. No; the longest that I know of—that is on the basis of pay; there are some that are longer in time; some of those long local or accommodation trains that they have in the far West—but the speed basis, 6 hours and 40 minutes of the western award, I think, is the lowest speed basis.

Mr. GARRETSON. There is no through traffic that is affected by it.

Mr. SHEEAN. There is no through traffic that is affected by it. The Senator was asking about the word "persons," on line 10. I suggested last evening that I thought by the time your eagle eye had gone over this that the word "persons" would be taken out of it.

Mr. GARRETSON. I had my eagle eye on it, but I did not see very well.

Mr. SHEEAN. Answering the question, I think in view of the provisions of section 3 that it should be not less than the present day. I do not think anybody would be affected by the enactment of this law. (Hearing before Senate committee, S. Doc. No. 549, 64th Cong., 1st sess., pp. 97–98.)

But the great majority of railroad employees engaged in the operation of interstate trains come within the field of operation of the act (Appendix G, p. 84). For convenience, we shall refer to employees engaged in passenger-train service and employees of carriers which already have the eight-hour standard day in effect, a list of which appears as Appendix E, page 80, of this brief, as the unaffected

class, and to all other employees engaged in the operation of interstate trains as the affected class.

The law has no effect upon the former class, because its purposes have already been accomplished by agreement between the parties. There may be a few exceptions to this rule, but they are negligible.

On the other hand, the law is operative upon the affected class; and we shall now consider whether it is workable as to this class and what changes in the agreements between it and the carriers are made necessary thereby.

The present standard day, as defined under existing agreements and schedules, for this class of employees on all the railroads, is as follows: "One hundred miles or less, ten hours or less, will constitute a day's work," overtime accruing after 10 hours. The few railroads which vary from this standard are set out in Appendix H, page 86, of this brief. They all have a shorter day than the standard 10-hour day. This list of carriers was prepared by the railroads and submitted by Mr. Thom to the Senate committee in the following words:

> Mr. Chairman, I would like to ask the privilege for Mr. Elisha Lee to file as part of his statement a statement showing the roads having service other than 10 miles per hour. (Hearing before Senate committee, S. Doc. No. 549, 64th Cong., 1st sess., p. 154.)

The railroads having this 10-hour standard constitute, according to Mr. Elisha Lee, about 85 per cent of the service for the whole country. (Idem,

p. 93.) To this 85 per cent must, of course, be added the railroads having the 8-hour standard and the others having standards varying between 8 and 10 hours per day. These three classes comprise practically all employees of interstate carriers, and their agreements with these employees may be adjusted to the law and its every requirement by simply modifying them to read: "One hundred miles or less, eight hours or less, will constitute a day's work," instead of "one hundred miles or less, ten hours (or other number of hours, as the case may be) or less, will constitute a day's work."

This does not seem to be a very difficult solution of the problem, nor does the change in the agreements appear to constitute so insurmountable a difficulty as to render the act unworkable and therefore unconstitutional.

Indeed, this was the only change in the agreements that anybody anticipated during the discussion of the bill while pending before Congress. And it is very significant that no one, not even the eminent lawyers and managers of the railroads, contended until after the passage of the law that it was unworkable.

All objections were directed to the claim that the principle of arbitration was being endangered and an unjust expense laid upon the carriers, to be ultimately borne by the public.

At the hearing before the Senate committee not one of the able men representing the railroads claimed or suggested that the law would be unwork-

able, but all assumed that the mere change from the established and well-understood 10-hour standard day to the proposed 8-hour standard day was all that was necessary or intended.

Indeed, the railroads represented that they were acting only as trustees for the public and that any congressional action taken would be promptly obeyed.

> Now, I am going to conclude. If you adopt the 8-hour day, of course we will have to abide by it. (Statement of Judge Lovett, hearing before Senate committee, S. Doc. 549, 64th Cong., 1st sess., p. 79.)
>
> Mr. SHEEAN. We have taken the position throughout that a mandate from any tribunal would be, of course, recognized, bowed to, and carried out by the railroads. Of course, a mandate coming from the people will be bowed to and carried out. The responsibility, as Judge Lovett said this morning, is yours, not ours. (Idem, p. 95.)
>
> Mr. THOM. * * * I pledge you for those I represent that whatever may be the result of your conclusion they will loyally and at once accept it. (Idem, p. 104.)

The workability of the plan was not only not challenged but apparently conceded by the railroads in their proposals submitted through the President to the brotherhoods.

> We propose as a basis of settlement the following:
>
> (*a*) The railroads will, effective September 1, 1916, keep the time of all men represented in this movement upon an eight-hour basis and

by separate account, monthly, with each man, maintain a record of the difference between the money actually earned by him on the *present* basis and the amount that would have been earned upon an *eight-hour basis*, overtime on each basis to be computed pro rata. (Hearing before Senate committee, S. Doc. 549, 64th Cong., 1st sess., p. 41.) (Italics ours.)

In the discussions before the committee, the managers and counsel of the railroads took the same view.

> You have heard also the other proposition that was made that we would keep all our accounts on the basis of an eight-hour day, have a commission appointed by the President to say what was right after reviewing all the facts, and we would act from the beginning in accordance with that suggestion. (Statement of Mr. Thom, Hearing before Senate committee, S. Doc. 549, 64th Cong., 1st sess., p. 103.)
>
> A simple illustration will perhaps suffice to show you how the eight-hour basis of pay would work out. Take, for example, a freight engineer paid 5 cents a mile with a day's guaranty of $5 for 100 miles or 10 hours or less. *It is proposed to make this guaranty the same for eight hours or less.* On a freight run of, say, only 60 miles in ten hours, he earns $5 for his time. It is now proposed that for this work he be paid $5 for the first eight hours and $1.25 for the other two hours, a total of $6.25, increasing his pay 25 per cent. (Statement of Mr. Elisha Lee, idem, pp. 85–86.)

The carriers apparently found no difficulty in applying the law's provisions to ascertain the additional expense they claim it would entail.

> For the purpose of ascertaining the cost of this proposition to the railroads, the railroads, all of them, were requested to apply the propositions of the men to the time slips or time tickets. Those are the tickets made out generally by a conductor or an engineer showing the points between which he has made his trips, the number of miles or length of travel. That is the slip on which the man's time or pay is made up. The roads are requested to take these time slips and apply the proposition of the men to those time slips and figure on each time slip what the increased cost would be for the month of October last, October, 1915, for instance. Then it was found out what percentage the pay roll—the October pay roll—bore to the whole year, and that percentage applied to the increase found for October. (Statement of Mr. Elisha Lee, idem, p. 88.)

Section 3 of the act, the consideration of which we have reserved for separate treatment, does not affect the construction above advocated nor render the act unworkable, as now claimed by the railroads. This section was in its present form in the original bill, but its alleged unworkability was apparently not discovered by the carriers until after the passage of the act. The section is as follows:

> That pending the report of the commission herein provided for, and for a period of thirty

> days thereafter, the compensation of railway employees subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

It will be noted, in the first place, that this section of the act, by its own limitation, lapses thirty days after the submission of the commission's report. Thereafter the parties are free to agree upon any wage they may think proper.

Clearly it was in the minds of Congress separable from the permanent provisions of the act and can be eliminated, if held unconstitutional, without affecting other parts of the act.

But this is not necessary, because, we submit, full effect can be given to section 3 without affecting the workability of the act.

The railroads claim that there is no "present standard day's wage," and that they have, therefore, no standard or measure by which they may be able to determine whether or not their wage payments will violate the law. It is clear that Congress and all parties interested at the time the bill was being considered construed the section to mean that the existing wages of the employees affected should not be reduced below what they were at that time receiving. This amount is easily ascertainable from the books of the carriers, and if they do not reduce,

because of shorter hours of service, the present wage of any of their employees, they may be assured that they have not violated the provisions of the law.

But we do not have to rely even upon this reasonable construction of the section. The expression "present standard day's wage" means the actual wage now received in each class of service on the several railroad lines, and is a term that is, and has been for a great number of years, thoroughly understood by the carriers and their employees.

If, therefore, this statute, which applies to a particular business and directly affects that business, is interpreted according to the signification given to its words by those engaged therein, its meaning is perfectly plain. This court has held that such meaning must be given to words having a technical meaning. (*United States* v. *Patterson*, 150 U. S. 65, 68; *Arthur* v. *Morrison*, 96 U. S. 108, 111; *Curtis* v. *Martin*, 3 How. 106.) Furthermore, it is the duty of the court, if there is any doubt about the constitutionality of the law, "to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution." (*Grenada County Supervisors* v. *Brogden*, 112 U. S. 261, 269.)

We have seen that, in practically all instances, the "present standard day's wage" is expressed in terms of hours and miles, and the ratio for reducing one to the terms of the other has been provided. In this connection, Mr. Elisha Lee said:

> In considering the pending bill, it should be borne in mind that the existing wage schedules of the railroads are on a dual basis—100 miles or less constituting a day, with provisions for overtime after a period produced by dividing the miles per run by the basis of speed prescribed. That is, if you have 100 miles, you divide that by 10 miles an hour, and you get 10 hours as the basis. If you have 120 miles, on a 10-mile-an-hour basis, you divide 120 by 10, which gives 12 hours before overtime begins. (Hearing before Senate committee, S. Doc. No. 549, 64th Cong., 1st sess., p. 83.)

Railroad arbitration boards, in their awards, ordinarily express the standard day in terms of hours and miles. The following instances are taken from the report of the United States Board of Mediation and Conciliation on the Effects of Arbitration Proceedings upon Rates of Pay and Working Conditions of Railroad Employees, Sixty-fourth Congress, first session, Senate Document No. 493.

In *Coal and Coke Railway Company and Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors, and Brotherhood of Railroad Trainmen, 1911*, the award with reference to the engineers and the firemen read:

> In all freight and mixed train service, including mine runs, and pusher or helper service, 100 miles or less or 10 hours or less, will constitute a day's work. (S. Doc. No. 493, p. 184.)

With reference to the conductors and trainmen in passenger service, on certain runs, the award provided: "Ten hours or less to constitute a day's work." (S. Doc. No. 493, pp. 184, 188.)

In *Railroads in Eastern Territory and Brotherhood of Locomotive Engineers, 1912*, the arbitrators awarded "Freight service: The minimum rate for freight engineers shall be $4.75 for 10 hours or less or 100 miles or less." (S. Doc. No. 493, p. 208.)

In *Railroads in Eastern Territory and Brotherhood of Locomotive Firemen and Enginemen, 1913*, the arbitrators granted the following request of the men: "Article 1. Ten hours or less, 100 miles or less to constitute a day's work in all classes of service, except as otherwise specified." (S. Doc. No. 493, p. 284.)

In *Railroads in Eastern Territory and Order of Railway Conductors, Brotherhood of Railroad Trainmen, 1913*, the award read: "This request was allowed with the exception that overtime should be paid for at a speed of 10 miles an hour." (S. Doc. No. 493, p. 322.)

The only exceptions to the general rule that a definite number of hours is to be used as the basis of pay are the few instances where trainmen, engaged in passenger or excepted line service on certain roads, are employed on a monthly or other time basis. But even in such cases the present day's wage of such employee is easily ascertainable, according to rules set out in the schedules, by dividing, in some cases, the amount received by the number of days in the

calendar month, and, in others, by the number of days actually worked by the employee.

But even if there should be a few instances where the actual daily wage could not be exactly ascertained, certainly these exceptions should not invalidate the law. The more reasonable action would be to require an adjustment of these exceptions to the law rather than set aside the law.

In view of the above, we may be excused for failing to give much weight to recently acquired views of counsel about the unworkability of the act which are based upon mere theories and speculations. We are confident that experience will belie their gloomy predictions.

Certainly this court will not strike down the law upon mere prophecies of what will be its effect when ample provision has been made therein for accurately ascertaining the facts by experience. The law, in the absence of facts "showing beyond any just or fair doubt" that it is unworkable, will be presumed to be valid. It will be time enough to declare the law unconstitutional when "a practical experience of the effect of the acts by actual operation" should demonstrate it to be unworkable. (*Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 54.)

This court is here concerned with the power of Congress to pass the law, and not with the duty of determining whether hypothetical situations would violate its provisions. When actual facts have replaced anticipated happenings, the court may construe the act with reference to such facts as they arise.

## IV.

### THE PENALTIES PROVIDED BY THE ACT ARE NOT EXCESSIVE.

The contention is made that the penalties provided are so drastic as to prevent an orderly resort to the courts for a just determination of complainant's rights.

The penalties are set out in section 4, which is as follows:

> That any person violating any provision of this act shall be guilty of a misdemeanor and upon conviction shall be fined not less than $100 and not more than $1,000, or imprisoned not to exceed one year, or both.

The minimum penalty provided is $100. A smaller penalty than this could hardly have been provided and obedience to the law assured. Certainly it can not be deemed drastic. This amount is the minimum penalty in a number of acts, both Federal and State, which have been sustained by this court. For example, the 28-Hour Law (*Baltimore and Ohio Southwestern R. R.* v. *United States*, 220 U. S. 94); Safety Appliance Law (*Johnson* v. *Southern Pacific Co.*, 196 U. S. 1); Hours of Service Law, and also section 20 of the Act to Regulate Commerce penalizing failure to report violations of the Hours of Service Law (*Baltimore and Ohio R. R.* v. *Interstate Commerce Commission*, 221 U. S. 612); animal quarantine law (*United States* v. *Nixon*, 235 U. S. 231).

This court has upheld penalty provisions of State laws which are much severer than those imposed by the act now under consideration. (*Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651; *Waters-Pierce Oil Co.* v. *Texas*, 106 S. W. 918, 930, affirmed in 212 U. S. 86.)

Furthermore, the penalties are separable from the rest of the act, and if an oppressive application of them should be attempted, it will be time enough then for the carrier involved to file its bill. No cases have been instituted under the law, and, under the stipulation entered into between the Attorney General and the railroads, none will be instituted until after the determination of the constitutionality of the law by this court. This case, therefore, falls within the following authority.

> There is the frequently recurring contention that the ordinance is void because of the great penalties that may be incurred in the time necessary to test its legality. Especially mentioned is section 27, as amended in 1902, which imposes a fine of from $100 to $500 for each pole remaining after the time set for their removal, and of from $100 to $500 for every week thereafter. It does not look as if the penalties in this ordinance were established with a view to prevent the appellant from resorting to the Federal courts, nor do we apprehend that an attempt will be made to enforce them in respect to the past. But the penalties are separable from the rest of the ordinance, and if an oppressive application of them should be attempted it will be time enough then for the appellant to file its bill. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 417. *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 443. (*Western Union Tel. Co.* v. *Richmond*, 224 U. S. 160, 172); cited with approval in *Chesapeake and Ohio Ry. Co.* v. *Conley*, 230 U. S. 513, 522.

## V.

### CONSTITUTIONAL INTERPRETATION.

Two coordinate branches of the Government have evidenced the opinion that the law is constitutional. The judicial branch of the Government, therefore, should not decide that Congress and the President have transcended their powers unless it is manifest that they have done so.

> It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt. (*Legal Tender Cases*, 12 Wall. 457, 531.)
>
> * * * when this court is called on in the course of the administration of the law to consider whether an act of Congress, or of any other department of the Government, is within the constitutional authority of that department, a due respect for a coordinate branch of the Government requires that we shall decide that it has transcended its powers only when that is so plain that we can not avoid the duty. (*Trade-Mark Cases*, 100 U. S. 82, 96.)
>
> That is a consideration of vast importance, because the court has never exercised the mighty power of declaring the acts of a coordinate branch of the Government void except where there is no possible and sensible construction of the act which is consistent with the fundamental organic law. The presumption that other branches of the Government

will restrain themselves within the scope of their authority, and the respect which is due to them and their acts, admits of no other attitude from this court. This is more than a canon of interpretation, it is a rule of conduct resting upon considerations of public policy, and, in the exercise of the delicate function of condemning the acts of coordinate and equal branches of the Government, under the same obligation to respect the Constitution as ourselves, has been observed from the beginning. I regard the rule as so vital and fundamental in this and all other parts of the case that I select almost at random some expressions of it by different justices of this court. (Dissenting opinion, Mr. Justice Moody, *The Employers' Liability Cases*, 207 U. S. 463, 509, 510, and cases therein cited.)

## CONCLUSION.

The judgment of the District Court should be reversed, the injunction dissolved, and the bill dismissed.

Respectfully,

T. W. GREGORY,
*Attorney General.*

JOHN W. DAVIS,
*Solicitor General.*

E. MARVIN UNDERWOOD,
*Assistant Attorney General.*

FRANK HAGERMAN,
*Special Assistant to the Attorney General.*

JANUARY, 1917.

## Appendix A.

In the Supreme Court of the United States.

Francis M. Wilson, United States Attorney,
Appellant,

*v.*

Alexander New and Henry C. Ferris, Receivers,
Appellees.

*Stipulation.*

The Attorney General of the United States and counsel for appellees and counsel for the various railroads and receivers, which have instituted proceedings to enjoin the enforcement of the so-called Adamson law, hereby stipulate as follows:

1. For the purpose of obtaining at an early date the opinion and judgment of this court upon the questions presented by the record in this case, more especially upon the constitutionality of the said Adamson law, the appeal herein shall be prosecuted with all convenient speed and all parties will cooperate to this end, and on December 4, 1916, join the Government in asking the court that it be advanced for argument at the earliest possible date.

2. Any additional contracts or schedules under which the employees and the several railroads are now working which do not appear in the present case, but which counsel for either side may deem to be necessary to illustrate the provisions of the act, may be submitted for consideration in the argument and

presentation of the present case, provided that the opposite side is served with copies thereof not later than December 4, 1916.

3. Pending the disposition of this case all like cases now brought on behalf of the several railroads parties to this stipulation shall remain in *statu quo* and no further cases of the same or like character shall be instituted by them prior to such disposition.

4. Pending such disposition no prosecution shall be instituted by the United States nor any conviction sought under section 4 of said act.

5. In each pending case except this a consent order shall be entered continuing further action therein until the decision of this court, and providing that plaintiff from and after January 1, 1917, shall keep its books and accounts in such manner that, if the constitutionality of the act is upheld, it shall ascertain the amount due to the employees affected under the construction placed upon the act by this court and shall promptly pay them said amounts, which right can at any time be enforced for their benefit on their own motion or on the motion of the defendant United States Attorney.

6. By the consent of the court appointing them, the receivers in this case, through their counsel, Arthur Miller, hereby designate Walker D. Hines, the chairman of the committee of counsel representing the railroad companies and receivers which have instituted the proceedings herein above referred to, as cocounsel to have charge with him of the presentation of this case for appellees in this court. Said Miller shall have complete charge of this case so far as concerns the advancement, in the efforts for which said Hines shall join.

7. Any railroad not a party hereto may become such by filing with the Attorney General of the United States notice of its concurrence in the provisions hereof.

FOR THE ATTORNEY GENERAL,
By G. CARROLL TODD,
*Assistant to the Attorney General.*
E. MARVIN UNDERWOOD,
*Assistant Attorney General.*
FRANK HAGERMAN,
*Special Assistant to the Attorney General,*
*Solicitors for Appellant.*
ARTHUR MILLER,
*Solicitor for Appellees.*
WALKER D. HINES,
*Chairman of the Committee of all*
*the Railroads Aforesaid.*

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## Appendix B.

## Hazards of Railroad Service.

### 1. MORTALITY AND ACCIDENT RATES.

The occupational risks of railroad labor exceed those in almost every other industry. The percentage of deaths from industrial accidents is from 2 to 5 times higher among railroad men than among occupied males.

*U. S. Bureau of Labor Statistics. Industrial Accident Statistics. March, 1915.*

EXTRACT FROM TABLE 77. PROPORTIONATE MORTALITY OF MALES FROM ACCIDENTS, 1907 TO 1912.

| RAILROAD CONDUCTORS. | | LOCOMOTIVE ENGINEERS. | |
|---|---|---|---|
| Per cent of deaths due to accidents. | | Per cent of deaths due to accidents. | |
| In specified occupation. | Among occupied males. | In specified occupation. | Among occupied males. |
| 23.7 | 9.4 | 26.2 | 9.4 |
| LOCOMOTIVE FIREMEN. | | RAILROAD MEN (other than those specified, but not including agents or clerks). | |
| 43.6 | 9.4 | 26.8 | 9.4 |

According to the Prudential's industrial experience for the four years ending with 1910, the proportionate mortality from accidents among occupied males, ages 15 and over, in the mortality from all causes, was 9.3 per cent; at ages 15 to 24, the proportion of deaths from accidents was 20.4 per cent; at ages 25 to 34 it was 12.8 per cent; at ages 35 to 44 it was 9.8 per cent; and at ages 45 to 54 it was 8.8

per cent. * * * Among railway brakemen the proportion of deaths from accidents at ages 15 and over was 63.3 per cent of the mortality from all causes; at ages 15 to 24 the proportion was 77.2 per cent; at ages 25 to 34 it was 67.2 per cent; at ages 35 to 44 it was 41.3 per cent; and at ages 45 to 54 it was 53.6 per cent. * * *

It is thus brought out by means of the proportionate mortality that the burden of fatal accidents falls most heavily upon the earlier years of life, when premature death is a social and economic calamity. *Frederick L. Hoffman, statistician Prudential Insurance Co. Transactions of the 15th International Congress of Hygiene and Demography, 1912.*

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*Metropolitan Life Insurance Co.—Mortality experience, 1911–1913. Louis I. Dublin, statistician, American Journal Public Health, Sept., 1915.*

NUMBER OF DEATHS FROM PRINCIPAL CAUSES AND PER CENT EACH CAUSE OF ALL CAUSES.

| Occupation. | Cause of death. | Age period, 15 and over. | |
|---|---|---|---|
| | | Number of deaths. | Per cent. |
| RAILWAY ENGINE MEN AND TRAINMEN. | All causes | 947 | 100.0 |
| | Tuberculosis of the lungs | 133 | 14.0 |
| | Organic diseases of the heart | 51 | 5.4 |
| | Suicide (all forms) | 23 | 2.4 |
| | Accidental violence | 401 | 42.4 |

During a recent arbitration of wages of locomotive engineers, firemen, and hostlers on western railroads it was testified that during a 10-year period approximately 47 per cent of all deaths of members of the Brotherhood of Locomotive Firemen and Enginemen were the direct result of railway accidents.

In no other industry is the occupational hazard so great as in the making up and transportation of railway trains. The railroad industry, however, reflects no recognition of this hazard in the wages of its employees.

The experience of the organization (Brotherhood of Locomotive Firemen and Enginemen) shows that more than 60

per cent of all deaths and disabilities are caused by railroad accidents. (*Why the Eight-hour Work Day is Right. W. S. Carter, 64th Cong., 1st session, Sen. Doc. 549, p. 137.*)

Because of these occupational dangers, the death rate among railroad men is from thirty to a hundred per cent greater than the average death rate.

Actual and expected number of deaths of locomotive firemen and other railway employees. (*Medico-Actuarial Mortality Investigation, 1913, Vol. III, pp. 132–141.*)

| RAILWAY LOCOMOTIVE FIREMEN. | | RAILWAY LOCOMOTIVE ENGINEERS. | | RAILWAY PASSENGER TRAINMEN (NOT CONDUCTORS). | |
|---|---|---|---|---|---|
| Actual deaths. | Expected deaths. | Actual deaths. | Expected deaths. | Actual deaths. | Expected deaths. |
| 193 | 101.84 | 541 | 337.38 | 76 | 55.52 |
| RATIO OF ACTUAL TO EXPECTED DEATHS. | | | | | |
| 190 | 100.0 | 160 | 100.0 | 137 | 100.0 |

## 2. ACTUARIAL ESTIMATE OF RISK.

The extrahazardous nature of these callings is reflected in the discriminatory action of the life insurance companies.

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The Northwestern Mutual Life Insurance Co., Milwaukee, Wis. From Instructions to Agents, issued May, 1911, p. 19:

"Policies not issued. Persons engaged in switching, coupling, or uncoupling cars, or in any capacity on trains of a railroad except as baggage or sleeping car conductor, mail agent, express messenger, or baggage-master. Locomotive engineers of mixed trains are insured at an extra premium."

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New England Mutual Life Insurance Co., Boston, Mass. From Rate Book issued October, 1908, pp. 292, 293:

"Prohibited risks. Applications of persons engaged in any of the following occupations or professions will not be considered, as the experience of the company proves that the

mortality of such classes largely exceeds the tabular expectation and is from two to three times the actual mortality on our entire business.

"* * * railroad yardman, engineer, fireman, or trainman engaged in railroad freight service, * * *."

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John Hancock Mutual Life Insurance Co., Boston, Mass. From Rate Book issued January 13, 1913, p. 2:

"Prohibited risks. Railroad employees: Conductors or brakemen on freight or mixed trains, locomotive engineers or locomotive firemen, roadbed laborers, section hands, switchmen, wrecking crews, and yardmen are not accepted."

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Penn Mutual Life Insurance Co., Philadelphia, Pa. Rules to be Observed by Sub-Agents and Solicitors, issued 1910, p. 46:

"Risks prohibited. Firemen—Locomotive and city fire department."

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Some of the companies refuse entirely to accept locomotive engineers, while others accept them under certain restrictions; these restrictions are, in effect, the actuarial estimate of the extra hazard due to the occupation. The practice of the New York Life Insurance Co. is typical of the attitude of the larger insurance companies in this respect. * * * The circular specifies that passenger conductors, express messengers, telegraphers, train dispatchers, and some others may be accepted at their actual age and may be given the regular life policies. Locomotive engineers, however, must first have eight years added to their actual age, and second, may be granted no cheaper form of policy than a 20-year endowment. The skilled workman in a powder factory has 10 years added to his age, while the locomotive engineer has 8 years. *Arbitration between the Brotherhood of Locomotive Engineers and Brotherhood of Firemen and Enginemen and the Western Railroads, 1914. Employees' Exhibit 43 (pp. 5–6).*

Locomotive firemen, however, must have 12 years added to their actual age and may receive no cheaper policy than a 20-year endowment. *The Occupation Hazard of Locomotive Firemen. Henry J. Harris, American Statistical Association, September, 1914.*

### 3. SHORTNESS OF TRADE LIFE.

Aside from the incidence of death and accidents in early life, the exhaustion of working capacity among engineers and firemen comes prematurely. Authorities agree that the length of working life of locomotive engineers is from 11 to 12 years.

#### Length of Trade Life of Locomotive Engineers.

One of the most important questions in any occupation is the length of time an average man may expect to be able to earn a living in that occupation. Obviously, an occupation in which the drain on the vitality of those engaged in it is so serious that they must soon retire from it should offer inducements to compensate for this early exhaustion of working capacity.

AGES OF 31,673 LOCOMOTIVE ENGINEERS ON RAILROADS IN EASTERN TERRITORY.

| Years of age. | Number of employees. | Per cent. |
|---|---|---|
| 21 to 30 | 3,409 | 10.8 |
| 31 to 40 | 12,532 | 39.6 |
| 41 to 50 | 8,922 | 28.2 |
| 51 to 60 | 5,196 | 16.3 |
| 61 to 70 | 1,600 | 5.1 |
| 71 to 80 | 14 | 0.0 |
| Total number employees | 31,673 | 100 |

The average age of the engineers in this table is 42 years; this average is probably much higher than for the railroads in other sections of the country, as the number of engineers above 60 is undoubtedly much larger than would be found in any other part of the country. * * *

The total number of engineers included in the above table (length of service) is 31,840, and the average length of service has been computed as being 12.4 years. * * *

The report of the officials of the mutual insurance organization of the Brotherhood of Locomotive Engineers states that in the period from January 1, 1897, to December 31, 1911, inclusive, 8,054 death benefits or disablement benefits to members were paid and that the average insured life

of these 8,054 members was 11 years 7 days. The two statements from entirely different sources are practically identical and establish the average working life of a locomotive engineer as between 11 and 12 years. (*Arbitration Bet. the Brotherhood of Locomotive Engineers and Brotherhood of Firemen and Enginemen and the Western Railroads, 1914. Employees' Exhibit 43. Henry J. Harris, formerly statistical expert, Department Commerce and Labor.*)

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Long terms of apprenticeship required.—Because of the arduous nature of the work, a young man can not enter it at the age of 14 or 16, as is true in trades like bookbinding, printing, plumbing, etc. Thus not only is he compelled to begin his chosen work later in life, but the term of apprenticeship is relatively longer than in the average industry. An employee must serve about six years as brakeman before becoming a freight conductor; and as freight conductor another six years before being considered competent to enter the passenger service. (*Railway Conductors. A Study in Organized Labor. Columbia University. Edwin Clyde Robbins. 1914. p. 86.*)

#### 4. INCREASING NERVOUS STRAIN.

With the increasing physical exactions of the train service, the responsibility and nervous strain have steadily kept pace. Keen vision, trained attention, and instant decision are its indispensable requirements. The employees are subject not only to the strict discipline and control exercised by the companies for the safety of the public, but, in case of accident, to the fear of criminal prosecution.

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If there is a reason for limiting the hours of labor in any employment it applies with peculiar force to the operation of railroad trains, since the safety of the traveling public is so largely dependent on the alertness and intelligence of train employees. *Report of the Interstate Commerce Commission. 1904, p. 105.*

From the time a trainman begins service he is drilled to regard the sacredness of a train order, the importance of a strict observance of signals and rules, the great need of caution, and the absolute necessity of keeping his wits about him and never forgetting a meeting point, nor the slightest detail of an order. He lives constantly in an atmosphere of caution, of admonition. The necessities of his vocation, the responsibilities connected with it, become a part of his life. * * *

A remarkable increase in the speed and weight of trains within recent years, and the crowding of tracks and terminals caused by the movement of an enormously enlarged volume of traffic, have greatly increased the duties and responsibilities of train-service employees and multiplied the chances of error on their part. *Ibid, 1912, pp. 64–65.*

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It is an established truth that the efficiency and integrity of attention depend upon the general and special training of the individual, backed by a healthy standard of mental and physical elements. It has also been demonstrated that in proportion to the ill-considered constancy and use of the attention that there is a tendency toward enervation and fatigue and the consequent abnormal manifestation of these. We know by long and oft-repeated examples of illustration that no man can apply his attention in an intense, keen, and overwrought way without there being abnormal manifestation. It can be stated as an absolute fact that in the manipulation of railway trains where speed is an essential and imperative factor mental uniformity and continuity are the only real and effective safeguards in the prevention of many such accidents as collisions, derailments, etc. * * * To the great mass of men seconds, minutes, and even hours of mental uncertainty, inattention and absent-mindedness mean a natural, necessary, and harmless mental relaxing process, but with the engineer, fireman, conductor, etc., who manipulate trains speeding through space from 75 to 100 feet a second, mental preoccupation, inattention, or absent-mindedness, indulged in even for

seconds or minutes, may lead to death-dealing wreck and catastrophe. *The Mental Condition of the Railway Employee As a Cause of Railway Accidents. W. B. Outten, M. D., chief surgeon Mo. Pac. R. R. Co. Editorial—Internat. Jour. of Surgery. March, 1909. P. 88–91.*

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The heavy responsibility of engineers, greater than that of any other class of employees in train service, the skill and efficiency required, the mental strain to which the men are subjected, and the hazard of the calling are all unanimously recognized by the board of arbitration. Therefore, the board accepts these points, brought forward by the engineers, at their full value.

In conclusion of this heading, the board agree that the compensation of the engineers should be adequate to cover their recognized responsibility, skill, efficiency, and the mental strain to which they are subjected. *Report of the Board of Arbitration. In the matter of the Controversy betw. the Eastern Railroads and the Brotherhood of Locomotive Engineers. 1912, pp. 19–20.*

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* * * With all perfect eyesight there are other things that make a perfect engineer. There are many men with perfect eyesight who are not safe to be locomotive engineers. They have to see, think, and act in a second, and that second takes them 80 feet. You will recognize that he may have only two car lengths to stop, and if he does not apply the brake at once and shut off the steam at the same time he is too late to prevent an accident. * * * A man with a high-speed 200-pound steam engine has to see, think, and act in the same second; two seconds would carry him 160 feet, one second is 80 feet; that is where we need men that can do that. *Official proceedings of the Western Railway Club. Chicago, 1905. Discussion. Mr. Peck, p. 127.*

Notwithstanding the theoretical merits of the block system as a means of safety, it by no means insures immunity from collisions. Some of the worst collisions noted in the accident

bulletins have occurred on block-signaled roads. Obviously, the block system can only afford protection when its danger warnings are observed and obeyed. The intensity of attention and quickness of perception required of enginemen on our modern, high-speed trains leads to the result that they sometimes fail to observe or obey signal indications, and when this happens disastrous consequences are almost sure to follow. (*Work of the Federal Government for the Prevention of Railroad Accidents. Hon. C. C. McChord, Cooperative Safety Congress. The Railway Conductor, November, 1912.*)

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The increasing amount of train mechanism every year imposes new responsibilities upon the locomotive enginemen. The tendency is to require the engineer to understand, not only anything about the locomotive from valve motion to steam superheating, but every detail of air-brake mechanism, train signals, heating apparatus, lighting appliances, and every other train attachment. If a modern locomotive engineer is capable of fulfilling the latest requirements he holds on a train a position analogous to that of the chief engineer of an ocean-going steamer * * *.— *Railway and Locomotive Engineering, November, 1914, p. 397.*

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* * * The modern railway employee, compelled to do his work under great pressure, surrounded by circumstances of peril, dealing with inherently dangerous forces, has no opportunity for deliberation, no time for weighing chances; he must act promptly, and under these circumstances ought not to be regarded as culpable, although sometimes not selecting the least dangerous way of performing his work. * * *

It becomes apparent, therefore, that in dealing with dangerous rapidly moving appliances, where the efficiency of the workman may depend as much upon his promptness as upon his skill, where he is compelled to work at high tension and surrounded by ever-varying dangers, he often sustains injury which appears to result from a lack of care upon his

part or the part of others, but which in reality is due to automatic movements or to a hasty selection of the more dangerous method of doing a thing, forced by the necessity for immediate action. (*Report of the Employers' Liability and Workmen's Compensation Commission, vol. 1, pp. 40, 42. 62d Cong., S. Doc. No. 338. 1912.*)

# APPENDIX C.

## I. HOURS OF SERVICE LAWS ENACTED BY CONGRESS.

| Sovereignty. | Date. | Class of employees. | Hours of service. | Absolute. | Exceptions permitted. | Construction of court. |
|---|---|---|---|---|---|---|
| United States and District of Columbia. | Aug. 1, 1892 (27 Stat. 340).. | Laborers and mechanics... | 8 | No.... | Extraordinary emergency. | Ellis v. U. S. (206 U. S. 246), constitutional—disappointment of contractor in obtaining material ordinarily not an "extraordinary emergency." |
| United States..... | Amended Feb. 27, 1906 (34 Stat. 33). | So as not to include laborers on Isthmian Canal within the Canal Zone. | ..... | ..... | ..... | Not construed. |
| Do..... | Again amended June 30, 1906 (34 Stat. 669). | So as not to include unskilled alien laborers and foremen and superintendents of such laborers on canal. | ..... | ..... | ..... | Do. |
| Do..... | Mar. 4, 1907 (34 Stat. 1415). | Trainmen and operators... | 9, 13, and 16 | No.... | Emergency, casualty, act of God, and where delay was not known to carrier when employee left a terminal. | Leading case B. & O. v. I. C. C. (221 U. S. 612), where act and failure to report act was held valid. Reasonable time may be imposed as to length of time employee may work. Exception in statute as to emergency does not render it void for uncertainty. |
| United States, Territories and District of Columbia. | June 19, 1912 (37 Stat. 137). | Laborers and mechanics on work for United States, Territories and District of Columbia. | 8 | No... | Extraordinary event or conditions of manufacture, emergency caused by fire, etc. | Not construed. |
| United States..... | Aug. 24, 1912 (37 Stat. 554). | Letter carriers and clerks in first and second class post offices. | ...do..... | No.... | Emergency, shall be paid extra in proportion to their salary. | Do. |
| District of Columbia... | Feb. 24, 1914 (38 Stat. 291). | Females in hotels, stores, etc. | ...do..... | Yes... | ..... | Law alleged to be unconstitutional in Hotchkiss v. D. C. (44 App. D. C. 73), but court did not think that assignment worthy of consideration. |

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| | | | | | | |
|---|---|---|---|---|---|---|
| Alaska | 1913 | Those engaged on public works. | 8 | No | Extraordinary emergency. | |
| Arizona | 1913 | Laborers or mechanics | 8 | No | do | The 8-hour law for women was held constitutional in State v. Dominion Hotel (151 Pac. Rep. 958). |
| Arkansas | 1907 | Telegraph and telephone operators. | 8 | Yes | | |
| California | Constitution | Laborers and mechanics on public works. | 8 | No | Extraordinary emergency. | The 8-hour law for women held constitutional (124 Pac. 247) and affirmed (236 U. S. 373). See also Bosley v. McLaughlin (236 U. S. 385). |
| Colorado | do | Persons on underground work, smelters, etc. | 8 | No | Emergency | |
| Connecticut | 1902 | Eight hours shall constitute a day's work unless otherwise agreed. | 8 | No | Agreement supersedes statute. | Agreement, express or implied, supersedes the statute. Excess of labor above 8 hours can not be recovered for in absence of agreement. Luske v. Hotchkiss (37 Conn. 219, 221) in construing a similar law. |
| Do | 1909 | Train operators | 8 | No | May work 12 hours where station is open in day only; in case of wreck, etc., 16 hours. | |
| Do | 1911 | Painter, carpenter, mason, etc., of any State institution. | 8 | Yes | | |
| Hawaii | 1905 and 1907 | Mechanics, laborers, clerks, etc., on public works. | 8 | Yes | | |
| Idaho | Constitution | State and municipal work. | 8 | | | |
| Do | 1911 and 1913 | Laborers, mechanics, etc., on behalf of State, etc. | 8 | No | Extraordinary emergency. | |
| Illinois | 1906 | Mechanical trades, arts, etc. | 8 | No | Farm employment, and where no contract to contrary. | |
| Kansas | 1909 and 1913 | Laborers and mechanics, etc., employed on behalf of State and county. | [1]8 | No | Extraordinary emergency. | |
| Kentucky | 1910 | Laborers and mechanics employed by State. | 8 | No | do | |

[1] Those working more than 8 paid on 8-hour basis.

## II. HOURS OF SERVICE LAWS ENACTED BY THE STATES AND TERRITORIES—Continued.

| Sovereignty. | Date. | Class of employees. | Hours of service. | Absolute. | Exceptions permitted. | Construction of court. |
|---|---|---|---|---|---|---|
| Massachusetts | 1909 | Laborers, mechanics, and workmen for State. | 8 | No | No. ——. Extraordinary emergency. | |
| Minnesota | Revised Laws, 1905 | Persons in manual labor for State. | 8 | No | do | |
| Missouri | Revised Statutes, 1909 | Persons in mining smelting business, etc. | 8 | Yes | | Law held constitutional. See Cantwell v. Mo. (199 U. S., 602). |
| Montana | Code 1907, as amended 1911. | Workmen in mines, railroad tunnels, etc. | 8 | No | Emergency | Law sustained in State v. Livingston Concrete, etc., Co. (34 Mont. 570, 87 Pac., 980). |
| Nevada | Revised Laws, 1912 | Mechanics, etc., about surface workings of any underground mine workings. | 8 | No | do | |
| New Mexico | Constitution | Employed on behalf of State, county, or municipality. | 8 | Yes | | |
| Do | 1912 | Trainmen | 16 | No | Casualty, act of God, etc. | |
| New York | 1909 as amended 1913 | All classes except farm and domestic employees unless otherwise provided by law. | 8 | No | Extraordinary emergency. | |
| Do | 1909 | Brickmakers for corporations. | 10 | Yes | | |
| Do | 1909 | Street car men | 10 | No | Accident; extra labor may be performed for extra pay. | |
| Ohio | Code 1910 | Workmen on any work aided by State, also foremen and policemen. | 8 | No | Extraordinary emergency. | |
| Ohio | Code, 1910 | Workmen in mechanical, mining, or manufacturing business. | 8 | No | Contract may expressly provide otherwise. | |
| Oklahoma | Revised Law, 1910 | Persons employed by State, any county, or municipality. | 8 | No | Extraordinary emergency: workmen to be paid on 8-hour basis. | |
| Oregon | 1910 | Miners | 8 | No | Emergency | |
| Pennsylvania | 1904 | All persons | 8 | No | Where no contract to the contrary. | |



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| | | | | | | |
|---|---|---|---|---|---|---|
| Do | 1897 | Workmen, etc | 8 | Yes | | In Commonwealth v. Casey (43 Pa. Sup. Ct., 494) law held constitutional and applicable to contractor for city filtration plant. |
| Texas | 1913 | Workmen, etc., for State, any county, etc., on bridges, roads, etc | 8 | No | Emergency | |
| Utah | Constitution | On work carried on or aided by State. | 8 | Yes | | |
| Do | 1896 | Workmen in mines | 8 | No | Emergency | In Holden v. Hardy (169 U. S. 366) the law was held constitutional, and the court said law was a progressive science to a certain extent |
| Do | Compiled Laws, 1907 | On work carried on or aided by State. | 8 | No | do | |
| Washington | Code, 1910 | Work for State, any county, or municipality. | 8 | No | do | |
| Do | do | All work on roads, bridges, etc. | 8 | No | Extraordinary emergency | Law construed and upheld in State v. Davis (43 Wash. Rep. 116). |
| West Virginia | Code, 1899 | Workmen, etc., employed in behalf of State. | 8 | Yes | | |
| Do | do | Work for State by any contractor or subcontractor. | 8 | No | Extraordinary emergency | |
| Wisconsin | 1911 | In manufacturing or mechanical business where no contract to contrary. | 8 | No | Contract to contrary | |
| Wyoming | Constitution | In mines and on State and municipal work. | 8 | Yes | | |
| Do | 1913 | On any public work of State or political division thereof. | 8 | No | Emergency | |
| Florida | 1906 | Persons performing manual labor. | 10 | No | May contract for greater or less number of hours. | |
| Louisiana | 1886, as amended 1902 | Employees, street railways | 10 | Yes | | |
| Maine | Revised Statutes, 1903 | All persons. (See exceptions.) | 10 | No | May contract differently; does not apply to monthly labor or agricultural employments. | Work in a grist mill within the statute. Batchelder v. Bickford (62 Me., 526). |
| Michigan | Compiled laws, 1897 | Persons in all factories, workshops, etc. | 10 | No | Overtime work to be paid at per diem rate, unless agreement to contrary. | Irregular occupations not within the statute. Schurr v. Savigny (85 Mich., 144). |

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II. HOURS OF SERVICE LAWS ENACTED BY THE STATES AND TERRITORIES—Continued.

| Sovereignty. | Date. | Class of employees. | Hours of service. | Absolute. | Exceptions permitted. | Construction of court. |
|---|---|---|---|---|---|---|
| Mississippi | 1912 | Persons in manufacturing or repairing work. | 10 | No | Emergency | The act included sawmills. State v. Newman (60 So. Rep., 215). The act included cottonseed oil mills. Buckeye Cotton Oil Co. v. State (60 So. Rep., 775). |
| Nebraska | Revised Statutes, 1913 | Laborers and mechanics | 10 | Yes | | |
| New Hampshire | 1901 | Laborers | 10 | No | May contract otherwise | |
| Rhode Island | 1909 | Conductors, etc., operating street railways. | 10 | No | Accident, unavoidable delay, etc. | Act is constitutional. In re Ten-Hour Law for Street Railways (54 Atl. Rep., 602). |

# APPENDIX D.

STATEMENT OF PERSONAL INJURIES TO EMPLOYEES, SHOWING CAUSES OF ACCIDENTS, HOURS ON DUTY, AND HOURS OF REST, AS REPORTED TO THE COMMISSION SINCE JULY 1, 1901.

| Killed. | Injured. | Cause of accident. | Hours on duty. | Hours of rest. |
|---|---|---|---|---|
| ..... | 1 | Lying beside track sleeping; struck by train | 21 | [a] |
| ..... | 1 | Asleep on track; struck by train | 21 | [a] |
| ..... | 1 | Sat on track; went to sleep and was struck by train | 20 | [a] |
| 1 | ..... | ....do | 18 | 12 |
| 1 | ..... | Sat on track; fell asleep and was struck by train | 25 | 4 |
| ..... | 1 | Sent back to protect rear of train; fell asleep at side of track; struck by train | 21 | [a] |
| 1 | ..... | Sat on track; went to sleep; struck | 15 | [a] |
| 1 | ..... | Fell asleep while sitting on track; struck by train | 17 | 7 |
| ..... | 1 | Sat on track; went to sleep; struck by train | 23 | 19 |
| ..... | 3 | Engineman dropped crown sheet, blowing out grates, ash pans, and connections | 23 | [a] |
| ..... | 1 | Asleep on track; struck by train | 17 | 12 |
| ..... | 1 | Sent out to flag train and fell asleep on track | 15 | 8 |
| 1 | ..... | Out flagging; went to sleep on track | 16 | 22 |
| ..... | 1 | ....do | 32 | [b] |
| 1 | ..... | Supposed to have sat on track and gone to sleep | 15 | [c] |
| ..... | 1 | Laid down between main track and siding; fell asleep and was struck by engine | 20 | [a] |
| ..... | 1 | Out flagging; went to sleep and was struck by engine | [d] 24 | [a] |
| 1 | ..... | Out flagging; sat down on rail and is supposed to have gone to sleep | 19 | 12 |
| 1 | ..... | Out flagging; went to sleep on track | ..... | 9 |

[a] Not given.
[b] Without proper rest.
[c] Had 48 hours opportunity for rest.
[d] Length of time caused by congestion of freight that had to be moved.

STATEMENT SHOWING TRAIN WRECKS, WITH NUMBER OF HOURS THAT TRAINMEN WERE ON DUTY, AND HOURS OF REST PREVIOUS TO GOING ON DUTY, AS REPORTED TO THE COMMISSION SINCE JULY 1, 1901.

| Collisions. | Derailments. | Personal injuries. | | Damage to cars. | Cause. | Hours on duty. | Hours of rest. |
|---|---|---|---|---|---|---|---|
| | | Killed. | Injured. | | | | |
| 1 | ..... | ..... | 2 | $2,000.00 | Crew falling asleep | 27 | 4 |
| 1 | ..... | ..... | 2 | 500.00 | Engineman falling asleep | 20 | 12 |
| 1 | ..... | 1 | 1 | 700.00 | ....do | 16 | 19 |
| ..... | 1 | ..... | 3 | 600.00 | Engineman and brakeman asleep | 18 | ..... |
| 1 | ..... | ..... | 3 | 1,300.00 | Overlooked train No. 11, mistaking it for No. 5 | 29 | 1¼ |
| 1 | ..... | ..... | 1 | 3,050.00 | Running down grade too fast | 18 | 13 |
| 1 | ..... | ..... | 1 | 1,036.00 | Running at high rate of speed | 18¼ | 17 |
| 1 | ..... | ..... | 2 | 6,656.00 | Train not under proper control | 22 | 13 |
| 1 | ..... | 1 | 2 | 1,350.00 | Snowplow ran into rear of caboose | 18 | ..... |



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STATEMENT SHOWING TRAIN WRECKS, WITH NUMBER OF HOURS THAT TRAINMEN WERE ON DUTY, AND HOURS OF REST PREVIOUS TO GOING ON DUTY, AS REPORTED TO THE COMMISSION SINCE JULY 1, 1901—Contd.

| Collisions. | Derailments. | Personal injuries. | | Damage to cars. | Cause. | Hours on duty. | Hours of rest. |
|---|---|---|---|---|---|---|---|
| | | Killed. | Injured. | | | | |
| 1 | ..... | 1 | 2 | $1,800.00 | Let engine run out at other end of switch and fouled main track | 18 | (a) |
| 1 | ..... | 2 | 3 | 3,064.00 | Engine crew of freight train forgot passenger train | 19 | 10 to 20 |
| 1 | ..... | ..... | 22 | 600.00 | Failed to wait prescribed time | 15 | 12 |
| 1 | ..... | ..... | 1 | 2,300.00 | Head-on collision of freight and extra | 21 | 14, 24 |
| 1 | ..... | ..... | 1 | 1,800.00 | Failure to flag train | 15 | 48 |
| 1 | ..... | ..... | 4 | 5,100.00 | Overlooked open switch | 20 | (b) |
| 1 | ..... | 2 | 1 | 7,000.00 | Engineman asleep | 9½ | 3 |
| 1 | ..... | 1 | ..... | 284.00 | Conductor not being out on train | 20 | ..... |
| 1 | ..... | ..... | 1 | 1,487.00 | Crew asleep | 24 | ..... |
| 1 | ..... | ..... | 1 | 230.00 | Engineman failed to have engine under control | 20 | ..... |
| 1 | ..... | 1 | ..... | 2,600.00 | Carelessness of engineman | 17 | 9 |
| 1 | ..... | ..... | 1 | 1,285.00 | Brakeman; improper flagging | 30 | 15 |
| 1 | ..... | 1 | 1 | 1,700.00 | Misplaced switch | 20 | ..... |
| 1 | ..... | ..... | 1 | 2,000.00 | Misunderstanding of signals | 18 | 10 |
| 1 | ..... | ..... | 2 | 505.00 | Crew not taking proper precaution | 24 | 24 |
| 1 | ..... | 1 | 11 | 2,050.00 | Engineman disobeyed orders | 15 | 10 |
| 1 | ..... | 1 | ..... | 5,900.00 | Flagman asleep | 16½ | 14½ |
| 1 | ..... | 1 | 1 | 4,905.00 | Engineman; train getting away | 17 | 4 |
| 1 | ..... | 3 | 1 | 14,500.00 | Conductor failed to give signal | 15 | 25 |
| 1 | ..... | 1 | 8 | 1,800.00 | Disobeyed signals | 48<br>47½ | ..... |
| 1 | ..... | 1 | ..... | 600.00 | Overlooked passenger train | 17 | (c) |
| 1 | ..... | ..... | 3 | 2,200.00 | Mistook red signal for green | 21 | ..... |
| 1 | ..... | ..... | 1 | 125.00 | Did not keep lookout | 17½ | 18 |
| 1 | ..... | 1 | 2 | 1,300.00 | Engineman and brakeman asleep | 16 | 8 |
| 1 | ..... | ..... | 3 | 600.00 | Flagman and conductor asleep | 18 | 11 |
| 1 | ..... | 1 | 3 | 5,000.00 | Flagman failed to get back proper distance | 17½ | 18½ |
| 1 | ..... | 1 | 13 | 30,350.00 | Not properly equipped with flagging signals | 18 | 8 |
| 1 | ..... | ..... | 4 | 210.00 | Running at too high rate of speed; foggy weather | 17 | 12 |
| 1 | ..... | ..... | 1 | 1,500.00 | Brakeman threw switch without instructions and fell asleep | 18 | 32 |
| 1 | ..... | 4 | 1 | 5,365.40 | Engineman not seeing flagman in time on account of smoke | 20 | 14 |
| 1 | ..... | ..... | 4 | 2,500.00 | Engineman of freight pulled out ahead of passenger train | 17 | 20 |
| 1 | ..... | ..... | 4 | 8,000.00 | Improper flagging | 16 | (d) |
| 1 | ..... | 1 | 3 | ..... | Disobeyed rule respecting open switch | 20 | (e) |
| 1 | ..... | 1 | 2 | 400.00 | Engineman responsible; not keeping proper lookout | 22 | 5 |
| 1 | ..... | ..... | ..... | 2,632.00 | Approaching station at too high rate of speed to stop after seeing signal | 17 | 3 |
| 1 | ..... | 1 | ..... | 1,000.00 | Not protected by flag | 15 | 11 |
| 1 | ..... | ..... | ..... | 3,500.00 | Carelessness of engineman | 18 | 40 |
| 1 | ..... | 1 | ..... | 400.00 | Flagman did not have flag out far enough | 17 | 24 |
| 1 | ..... | 1 | ..... | 500.00 | Disobeyed rule 99 in not properly protecting train | 22 | 5 |
| 1 | ..... | ..... | ..... | 500.00 | Conductor and brakeman at fault in moving train before track was clear | 15 | (f) |
| 1 | ..... | ..... | 3 | 883.00 | Brakeman failed to go to far end of car to see that they had cleared | 18 | 10 |

a Full rest. b Several days. c Ample rest. d Not given. e Two hours' intermission. f Several days.

STATEMENT SHOWING TRAIN WRECKS, WITH NUMBER OF HOURS THAT TRAINMEN WERE ON DUTY, AND HOURS OF REST PREVIOUS TO GOING ON DUTY, AS REPORTED TO THE COMMISSION SINCE JULY 1, 1901—Contd.

| Collisions. | Derailments. | Personal injuries. | | Damage to cars. | Cause. | Hours on duty. | Hours of rest. |
|---|---|---|---|---|---|---|---|
| | | Killed. | Injured. | | | | |
| 1 | ..... | ..... | ..... | $400.00 | Engineman pulled down main track instead of taking siding as ordered | 21 | 24 |
| 1 | ..... | ..... | ..... | 200.00 | Failure of engineman to control train after passing green signal | 26 | 23 |
| 1 | ..... | ..... | ..... | 400.00 | Slow signal disobeyed | 18 | (a) |
| 1 | ..... | ..... | 1 | 700.00 | Flagman not out far enough to protect his train; discharged | 16 | 24 |
| 1 | ..... | 2 | 8 | 4,000.00 | From not being properly protected | 23 | 36 |
| 1 | ..... | ..... | ..... | 425.00 | Engineman was asleep; discharged | 38 | 17 |
| 1 | ..... | ..... | ..... | 400.00 | Brakeman lost control of cars | 23 | 12 |
| 1 | ..... | ..... | ..... | 1,100.00 | Conductor failed to set switch for siding; brakeman also failed to make proper effort to stop train | 19 | 11 |
| 1 | ..... | 1 | 1 | 400.00 | Conductor and flagman were asleep in caboose; train had no protection | 21 | 5 |
| 1 | ..... | ..... | 6 | 1,000.00 | Brakeman failed to turn switch; train ran in on siding | 19 | 36 |
| 1 | ..... | ..... | ..... | 390.00 | Crew went to sleep | 24 | (b) |
| 1 | ..... | ..... | 3 | 2,300.00 | Disobeyed rule 17, train taking siding not being in the clear | (c) | ..... |
| 1 | ..... | ..... | ..... | 350.00 | Engineman at fault; in going back struck cars | 20 | (d) |
| 1 | ..... | ..... | ..... | 500.00 | Work train fouled main track without due protection. Rule: "An inferior train must keep out of the way of a superior train" | (c) | (e) |
| 1 | ..... | ..... | 3 | 1,700.00 | Failed to protect train | 24 | 9 |
| 1 | ..... | 2 | ..... | 994.00 | Conductor at fault for not having flagman out to protect train | 25 | (f) |
| ..... | 1 | ..... | ..... | 2,200.00 | Engineman at fault for not stopping when semaphore was against him and not having train under control | 19 | (e) |

a Sufficient rest.
b Two days.
c More than 15 hours.
d Ample rest.
e Less than 7 hours.
f Not given.

(House report dated Feb. 16, 1907, No. 7641, 59th Cong., 2d sess., pp. 8-9.)

## APPENDIX E.

*List of railroads having an 8-hour day basis for all employees except those engaged in local freight and excepted line service.*

Western territory:

El Paso & Southwestern.
San Antonio & Aransas Pass.
St. Louis, Brownsville & Mexico.
Houston & Texas Central.
Houston East & West Texas.

Southeastern territory:

Atlanta, Birmingham & Atlantic.
Central of Georgia.
Georgia, Southern & Florida.
Nashville, Chattanooga & St. Louis.
New Orleans & Northeastern.
Alabama & Vicksburg.
Vicksburg, Shreveport & Pacific.
Macon, Dublin & Savannah.
Georgia & Florida.
Gulf & Ship Island.
Norfolk & Southern.
New Orleans & Great Northern.

# APPENDIX F.

## RAILROAD WAGES, IF REDUCED BELOW PRESENT SCALE, WOULD BE INADEQUATE.

The current opinion that men in the railroad service are highly paid is erroneous. The 1915 statistics of the Interstate Commerce Commission show that the hourly wages are strikingly lower than the rates in other occupations calling for no greater skill and entailing far less responsibility and hazard.

AVERAGE HOURLY COMPENSATION OF RAILWAY EMPLOYEES FOR THE YEAR ENDED JUNE 30, 1915.[1]

| Class of employees. | Carriers. | | | | Switching and terminal companies. | | | |
|---|---|---|---|---|---|---|---|---|
| | Eastern district. | Southern district. | Western district. | Total. | Eastern district. | South district. | Western district. | Total. |
| Yard engineers and motormen | $0.422 | $0.433 | $0.424 | $0.424 | $0.404 | $0.401 | $0.434 | $0.415 |
| Yard firemen and helpers | .267 | .240 | .260 | .260 | .262 | .225 | .260 | .259 |
| Yard conductors | .386 | .370 | .395 | .386 | .365 | .362 | .392 | .375 |
| Yard brakemen | .354 | .310 | .360 | .349 | .342 | .285 | .359 | .345 |
| Yard switch tenders | .188 | .173 | .195 | .188 | .226 | .209 | .207 | .217 |
| Other yard employees | .169 | .160 | .170 | .167 | .228 | .142 | .222 | .221 |
| Hostlers | .243 | .239 | .250 | .244 | .215 | .228 | .237 | .224 |
| Road freight engineers and motormen | .556 | .657 | .618 | .593 | .393 | .340 | .392 | .385 |
| Road freight firemen and helpers | .367 | .379 | .394 | .378 | .252 | .198 | .243 | .244 |
| Road freight conductors | .473 | .515 | .514 | .494 | .358 | .318 | .367 | .354 |
| Road freight brakemen and flagmen | .325 | .317 | .356 | .333 | .313 | .224 | .309 | .299 |
| Road passenger engineers and motormen | .742 | .942 | .842 | .805 | .390 | .340 | .343 | .351 |
| Road passenger firemen and helpers | .464 | .507 | .543 | .497 | .252 | .184 | .240 | .240 |
| Road passenger conductors | .626 | .670 | .686 | .653 | .549 | .312 | .320 | .360 |
| Road passenger baggagemen | .377 | .397 | .270 | .360 | ..... | ..... | .219 | .219 |
| Road passenger brakemen and flagmen | .387 | .328 | .378 | .376 | .348 | .227 | .314 | .324 |
| Other road trainmen | .256 | .289 | .309 | .290 | .214 | ..... | ..... | .214 |

[1] These figures are taken from the Twenty-eighth Annual Report of the Interstate Commerce Commission on the statistics of railways in the United States for the year ended June 30, 1915.

UNION SCALE OF WAGES AND HOURS OF LABOR.[1]

| | Eastern district, New York. | | | Southern district, Atlanta. | | | Western district, Kansas City, Mo. | | |
|---|---|---|---|---|---|---|---|---|---|
| | Rate of wages. | | Hours of labor. | Rate of wages. | | Hours of labor. | Rate of wages. | | Hours of labor. |
| | Per hour. | Overtime ratio. | Per full day. | Per hour. | Overtime ratio. | Per full day. | Per hour. | Overtime ratio. | Per full day. |
| | *Cents.* | | | *Cents.* | | | *Cents.* | | |
| Bricklayers | 75.0 | 2 | 8 | 45.0 | 1½ | 9 | 75.0 | 1½ | 8 |
| Carpenters (outside) | 62.5 | 2 | 8 | 40.0 | 1½ | 9 | 65.0 | 1½ | 8 |
| Elevator constructors | 66.0 | 2 | 8 | 50.0 | 2 | 9 | 65.6 | 2 | 8 |
| Hod carriers | 37.5 | 2 | 8 | | | | 45.0 | 1½ | 8 |
| Marble-setters | 68.8 | 2 | 8 | 68.8 | 1½ | 8 | 68.8 | 1½ | 8 |
| Plasterers | 68.8 | 2 | 8 | 45.0 | 1½ | 9 | 75.0 | 2 | 8 |
| Stonecutters | 68.8 | 2 | 8 | 50.0 | 1½ | 8 | 62.5 | 1½ | 8 |
| Compositors (night work) | 73.3 | 1½ | 7½ | 50.0 | 1½ | 8 | 59.4 | 1½ | 8 |
| Machine tenders (newspaper, day work) | 57.8 | 1½ | 7½ | 52.1 | 1½ | 8 | 62.5 | 1½ | |

[1] These figures are taken from Bulletin of the United States Bureau of Labor Statistics Whole No. 194, "Union Scale of Wages and Hours of Labor, May 1, 1915."

While the demands on the train crews have steadily grown, and according to the railroads' own statements are expected to increase in the future, traffic statistics show that the number of trainmen employed has not increased.

In the ten years 1904–1914 [1]

1. The average traction power of locomotives increased 33.3 %
2. The average capacity of freight cars increased 30.0 %
3. The average number of freight cars per train increased 28.8 %
4. The average number of loaded cars per train increased 23.9 %

[1] Derived from Statistics of Railways, Bureau of Railway Economics, 1915, pp. 24, 25, 32, 43, 51, 54, 55.

5. The average number of tons in each loaded car increased 22.6 %

6. The average number of tons carried per freight train increased 43.5 %

Yet the number of employees per 100 miles of line has remained the same. The physical labor of firing a modern high power locomotive burning coal at the rate of more than a ton an hour, of controlling the complicated machinery of the engine has reached the limit of human endurance.

# APPENDIX G.

*Showing the basis of pay of engineers and firemen in freight service, as submitted by Conference Committee of Managers for Western Territory in arbitration proceedings of 1914.*

CONFERENCE COMMITTEE OF MANAGERS, WESTERN TERRITORY, CHICAGO, ENGINEERS' AND FIREMENS' WAGE MOVEMENT, 1914.

PROPOSED ARTICLE I—BASIS OF A DAY'S WORK.

All other service except switching: One hundred miles or less, 10 hours or less, will constitute a day's work in all classes of service except passenger and switching service. All mileage in excess of 100 miles shall be paid for pro rata. Ten miles' run will be the equivalent of one hour's service performed, or vice versa.

| Western territory. Engineers. | Per cent to total mileage. |
|---|---|
| Through and local freight: | |
| 10 hours or less, 100 miles or less, through and local | 84.044 |
| 10 hours or less, 100 miles or less, local freight, 8 hours or less, 100 miles or less, through freight | .892 |
| 9 hours or less, 100 miles or less, through and local | 3.082 |
| 8 hours or less, 100 miles or less, through and local | 4.136 |
| 8 hours or less, 100 miles or less, through freight and main line local | .732 |
| 8½ hours or less, 100 miles or less, through and local | 1.833 |
| 10 hours or less, through and local | .183 |
| According to special provisions, 100 miles or less, 8 hours or less; 100 miles or less, 10 hours or less | 4.532 |
| No provision in schedules | .160 |
| No schedules available | .406 |
| Total | 100.000 |

| Eastern territory. Engineers. | Per cent to total mileage. |
|---|---|
| Through freight: | |
| 100 miles or less, 10 hours or less | 99.596 |
| 11 hours or less | .383 |
| No through freight service | .021 |
| Total | 100.000 |
| Local freight: | |
| 100 miles or less, 10 hours or less | 94.772 |
| 11 hours or less | .383 |
| 75 miles or less, 10 hours or less | 4.824 |
| No local freight service | .021 |
| Total | 100.000 |

| Southeastern territory. Engineers. | Per cent to total mileage. |
|---|---|
| Through freight: | |
| 100 miles or less | 0.692 |
| 100 miles or less, 6¼ hours or less | 2.099 |
| 100 miles or less, 8 hours or less | 54.950 |
| 100 miles or less, 8 or 9 hours or less according to specified districts | .376 |
| 100 miles or less, 9 hours or less | 41.883 |
| Total | 100.000 |
| Local freight: | |
| 100 miles or less, 8¼ hours or less | 2.099 |
| 100 miles or less, 9 hours or less | 7.770 |
| 100 miles or less, 10 hours or less | 85.296 |
| 100 miles or less, 10 or 11 hours or less according to specified districts | .376 |
| Irregular trains 100 miles or less, 8 hours or less, 0.376 per cent. | |
| Monthly basis, specified time each train. | 4.459 |
| Tramp locals 100 miles or less, 0.692 per cent. | |
| Total | 100.000 |



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| Western territory. | | Eastern territory. | | Southeastern territory. | |
|---|---|---|---|---|---|
| Firemen. | | Firemen. | | Firemen. | |
| | Per cent to total mileage. | | Per cent to total mileage. | | Per cent to total mileage. |
| Through and local freight: | | Through freight: | | Through freight: | |
| 10 hours or less, 100 miles or less, through and local | 84.261 | 100 miles or less, 10 hours or less | 99.979 | 100 miles or less, 9 hours or less | 41.583 |
| 8 hours or less, 100 miles or less, through freight; 10 hours or less, 100 miles or less, local | .892 | No through freight service | .021 | 100 miles or less, 8 hours or less | 19.808 |
| 9 hours or less, 100 miles or less, through and local | 1.833 | Total | 100.000 | Regular runs on trip basis, overtime after 8 hours and 9 hours, respectively, between specified points. Irregular runs 100 miles or less, 8 hours or less | .376 |
| 8 hours or less, 100 miles or less, through and local | 2.408 | Local freight: | | No schedules | 37.933 |
| 8 hours or less, 100 miles or less, through freight and main-line local | .732 | 100 miles or less, 10 hours or less (Boston & Maine—certain runs 75 miles or less, 10 hours or less) | 99.979 | Total | 100.000 |
| 8½ hours or less, 100 miles or less, through and local | 3.082 | No local freight service | .021 | Local freight: | |
| 10 hours or less, through and local | .381 | Total | 100.000 | 100 miles or less, 10 hours or less | 50.154 |
| According to special provisions 100 miles or less, 8 hours or less; 100 miles or less, 10 hours or less | 4.532 | | | 100 miles or less, 9 hours or less | 7.770 |
| No provision in schedules | .160 | | | Monthly basis, day's work specified | 3.767 |
| No schedules available | 1.719 | | | Trip basis, 9 or 10 hours, respectively, in districts | .376 |
| Total | 100.000 | | | No schedules | 37.933 |
| | | | | Total | 100.000 |

# APPENDIX H.

*List of railroads having services that vary from 100 miles or less, or 10 hours or less, per day, taken from the statement of Mr. Elisha Lee, Sixty-fourth Congress, first session, Senate Document 549, page 154.*

SOUTHEASTERN TERRITORY.

| Road. | Through freight. | | Local freight. | | Wrecking service. | | Remarks. |
|---|---|---|---|---|---|---|---|
| | Trainmen. | Enginemen. | Trainmen. | Enginemen. | Trainmen. | Enginemen. | |
| Atlanta, Birmingham & Atlantic.[1] | 12½ miles per hour. | 12½ miles per hour. | ..... | ..... | ..... | 12½ miles per hour. | Trainmen, branch line runs, overtime after 10 hours; enginemen, Manchester-Atlanta, Talladega, Birmingham, on turn-around basis, overtime after 12 hours. |
| Atlantic Coast Line[1] | 12 miles per hour | .....do..... | ..... | ..... | ..... | .....do..... | Branch lines, overtime after 12 hours. |
| Atlanta & West Point and Western Railway of Alabama.[1] | Regular trains after schedule has been exceeded 1 hour; on extra trains, overtime after 12 hours. | Regular trains after schedule has been exceeded 1 hour; on extra trains, overtime after 12 hours. | ..... | ..... | ..... | ..... | |
| Central of Georgia[1] | 12½ miles per hour. | 12½ miles per hour. | ..... | ..... | ..... | ..... | Trainmen, specified branch runs, overtime after 12 hours; enginemen, branch lines, overtime after 11 and 12 hours. |
| Chesapeake & Ohio. | 11 miles per hour | 11 miles per hour | 11 miles per hour | ..... | ..... | 11 miles per hour | Trainmen, branch line runs, overtime after 10 hours. |
| Cincinnati, New Orleans & Texas Pacific (Alabama Great Southern). | ..... | .....do..... | ..... | ..... | ..... | ..... | |

[1] No agreement with firemen.



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| Road. | Through freight. | | Local freight. | | Wrecking service. | | Remarks. |
|---|---|---|---|---|---|---|---|
| | Trainmen. | Enginemen. | Trainmen. | Enginemen. | Trainmen. | Enginemen. | |
| Florida East Coast[1]. | 12 miles per hour | 15 miles per hour | ..... | 12 miles per hour | ..... | ..... | Trainmen, specified branch runs, overtime after 12 hours; enginemen, branch lines, overtime after 12 hours. |
| Georgia Southern & Florida. | 12½ miles per hour. | 12½ miles per hour. | ..... | ..... | ..... | 12½ miles per hour. | |
| Georgia | 12 miles per hour | .....do..... | ..... | ..... | ..... | .....do..... | |
| Louisville & Nashville. | 11 miles per hour | .....do..... | ..... | ..... | ..... | .....do..... | Trainmen, specified runs, overtime after 8 and 10 hours, based on mileage of run; enginemen, specified runs, overtime varies from 6 hours and 30 minutes to 14 hours, based on mileage of run. |
| Mobile & Ohio..... | ..... | 11 miles per hour | ..... | ..... | ..... | 20 miles per hour; engineers paid 60 cents per hour for all time actually engaged at wreck; firemen paid 33 cents.‖ | Enginemen, branch lines, overtime after 12 hours, except on Okolona branch. |
| Southern Railway in Mississippi. | 11 miles per hour | .....do..... | ..... | ..... | ..... | .....do..... | Enginemen, branch lines, overtime after 12 hours. |
| Nashville, Chattanooga & St. Louis. | 12½ miles per hour. | 12½ miles per hour. | ..... | ..... | 12½ miles per hour; 5 minutes counted as 1 hour; 1 hour 5 minutes as 2 hours. | 12½ miles per hour. | Trainmen, branch-line runs, overtime after 12 hours; enginemen, specified runs, overtime after 12 and 13 hours and after schedule has been exceeded 30 minutes. |
| New Orleans & Northeastern (Alabama & Vicksburg and Vicksburg, Shreveport & Pacific). | .....do..... | .....do..... | ..... | ..... | ..... | ..... | Trainmen, New Orleans-Picayune run, overtime after schedule has been exceeded 1 hour; enginemen, when more than one trip is made, above rule applies. |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Norfolk & Western | 11 miles per hour | 11 miles per hour. | 11 miles per hour; branch lines and specified runs, overtime after 10 hours. | 11 miles per hour; specified runs, overtime after 11 hours 31 minutes; branch lines after 10 hours 30 minutes. | | | Trainmen, specified branch runs, overtime after 10 hours; enginemen, specified runs, overtime after 11 hours and 31 minutes; branch-line runs, overtime after 10 hours and 31 minutes. |
| Seaboard Air Line[1] | 12 miles per hour | 12½ miles per hour. | | | | 12½ miles per hour. | Branch lines, overtime after 12 hours, except trainmen on Bessemer branch; overtime after 10 hours. |
| Macon, Dublin & Savannah | 12½ miles per hour. | do | | | | do | |
| Southern (Virginia & Southwestern). | 11 miles per hour | 11 miles per hour. | | | | 20 miles per hour; engineers 60 cents, firemen 35 cents for all time actually engaged at wreck. | Specified runs, overtime after 10, 11, and 12 hours; trainmen, specified runs, overtime after 10 hours. |
| Tennessee Central | do | 12½ miles per hour. | | | | 12½ miles per hour. | Trainmen, branch lines, overtime after 12 hours; enginemen, branch lines, overtime after 10 and 12 hours. |
| Virginian | do | 11 miles per hour. | 11 miles per hour. | 11 miles per hour. | | | Trainmen, unless otherwise specified, overtime on branch lines after 10 hours. |
| Charleston & Western Carolina.[1] | 12 miles per hour. | 12½ miles per hour. | | | | 12½ miles per hour. | Enginemen, branch lines, overtime after 12 hours. |
| Richmond, Fredericksburgh & Potomac and Washington Southern. | Rates on trip basis. | Regular runs on trip basis; irregular freight service, 8 hours or less constitutes a day. | 12 miles per hour; between Potomac yards and Quantico, overtime after 9 hours; between Boulton and Quantico, overtime after 10 hours. | 12½ miles per hour; same as trainmen. | | | Between Boulton and Potomac yards, overtime after 8 hours; between Clopton and Potomac yards, overtime after 9 hours. |

[1] No agreement with firemen.



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## WESTERN TERRITORY.

| Road. | Through freight. | | Local freight. | | Other road service except passenger. | | Yard service. | | Remarks. |
|---|---|---|---|---|---|---|---|---|---|
| | Trainmen. | Enginemen. | Trainmen. | Enginemen. | Trainmen. | Enginemen. | Trainmen. | Enginemen. | |
| Atchison, Topeka and Santa Fe (coast lines). | 12 miles per hour..... | 10 miles per hour..... | 10 hours per day (monthly basis). | 10 miles per hour..... | 10 miles per hour..... | 10 miles per hour..... | 10 hours..... | 10 hours..... | 12 miles per hour speed basis applies only to trainmen in through freight service on Albuquerque and Arizona divisions. |
| Colorado and Southern..... | 10 miles per hour..... | 10 miles per hour except South Park division, overtime after 8 hours. | 10 miles per hour Fort Collins district (monthly basis), overtime after 9 hours. | 10 miles per hour except South Park division, overtime after 8 hours. | .....do..... | 10 miles per hour except South Park division, overtime after 8 hours (work trains 10 hours). | .....do..... | .....do..... | Enginemen—Irregular trips on Clear Creek district paid on basis of 100 miles for 85 miles, except work trains. On South Park division, 85 valley miles or 44 mountain miles constitutes a day. |
| Denver & Rio Grande..... | Colorado lines—First division—8 hours and 20 minutes per day. Other divisions 10 hours per day (tabulated runs excepted). Utah lines—10 miles per hour (tabulated runs excepted). | Colorado lines—10 miles per hour (tabulated runs excepted). Utah lines—12 miles per hour (tabulated runs excepted) | Colorado lines—First division—8 hours and 20 minutes per day. Other divisions 10 hours per day (tabulated runs excepted). Utah lines—10 miles per hour (tabulated runs excepted). | Colorado lines—10 miles per hour (tabulated runs excepted). Utah lines—12 miles per hour (tabulated runs excepted). | Colorado lines—First division—8 hours and 20 minutes per day. Other divisions 10 hours per day (tabulated runs excepted). Utah lines—10 miles per hour (tabulated runs excepted). All work trains 10 hours per day. | Colorado lines—10 miles per hour (tabulated runs excepted). Utah lines—10 miles per hour (tabulated runs excepted). All work trains 10 hours per day. | 10 hours. (At Leadville 5 hours constitutes a day on Sundays and holidays.) | .....do..... | Certain runs tabulated in schedule with arbitrary time limits for the day or trip. |
| El Paso & Southwestern..... | 12½ miles per hour..... | 12½ miles per hour..... | 12½ miles per hour..... | 12½ miles per hour..... | Work trains on 10-hour-per-day basis. Mixed service, 16 miles per hour. | Work and helper service on 12-hour-per-day basis. | 10 hours..... | .....do..... | Branch runs have arbitrary time limits. Trainmen, 11 and 12 hours; enginemen, 11 to 14 hours per day. |
| San Antonio & Aransas Pass.. | .....do..... | .....do..... | 10 miles per hour..... | 10 miles per hour..... | 10 miles per hour..... | 10 miles per hour..... | .....do..... | .....do..... | |
| St. Louis, Brownsville & Mexico. | .....do..... | .....do..... | 10 hours per day (monthly basis). | .....do..... | .....do..... | .....do..... | .....do..... | .....do..... | |
| Sunset Central Lines, including Galveston, Harrisburg & San Antonio; Texas & New Orleans; Louisiana Western; Morgan's Louisiana & Texas Railroad & Steamship Co.; Iberia & Vermilion. | Minimum speed 12 miles per hour. Schedule of train is limit of trip or day. | Minimum speed 12½ miles per hour. Schedule of train is limit of trip or day. | Minimum speed 10 miles per hour. Schedule of train is limit of trip or day. | Minimum speed 12½ miles per hour. Schedule of train is limit of trip or day. | Main line mixed service minimum speed 12 miles per hour. Other services 10 miles per hour. | Wrecking and main line mixed service 12½ miles per hour. Other services 10 miles per hour. | .....do..... | .....do..... | Trainmen in branch service governed by schedule of train and arbitrary time limits for the day. Enginemen on basis of 10 miles per hour. Trainmen have special speed basis of 12½ miles per hour in freight service on Morgan division. |
| Houston & Texas Central..... | 12½ miles per hour..... | 12½ miles per hour..... | 10 hours per day (monthly basis). | 12½ miles per hour..... | 10 miles per hour..... | Mixed trains 12½ miles per hour. Other services 10 miles per hour. | .....do..... | .....do..... | |
| Houston East & West Texas... | .....do..... | .....do..... | .....do..... | .....do..... | .....do..... | .....do..... | .....do..... | .....do..... | Enginemen in mixed, through, and local freight service paid on schedule of train with a minimum speed basis as shown. Irregular mixed service based on 18 miles per hour. |
| Southern Pacific (Pacific System). | 100 miles or less. Regular trains based on time-card schedule. Irregular trains on average of longest and shortest schedule in direction going. Turn-arounds 10 hours per day. | Minimum speed 12½ miles per hour (valley districts); 10 miles per hour (mountain districts); schedule of train is limit of day or trip. | 100 miles or less. Regular trains based on time-card schedule. Irregular trains on average of longest and shortest schedule in direction going. Turn-arounds 10 hours per day. | Minimum speed 12½ miles per hour (valley districts); 10 miles per hour (mountain districts); schedule of train is limit of day or trip. | .....do..... | Mixed trains on same basis as freight trains. Other services 10 miles per hour except fire trains are on a 12-hour basis. | 10 hours except second-class yards 11 hours (excluding meal hour). | 11 hours (including meal hour). | |

NOTE.—Other Western roads represented by the national conference committee of the railways are on the basis of 10 hours, or 10 miles per hour for road service; on certain of which roads there are specified, excepted, or branch-line runs that have arbitrary time limits for the day or trip. The Canadian Pacific (trainmen only), Canadian Northern, and Grand Trunk Pacific (not represented by this committee) have 9-hour day or 11 miles per hour speed basis.
Hostlers on all roads on basis of 12 hours, except the Terminal Railroad Association of St. Louis, which is on a 10-hour basis.
Variations from 10-hour day in yard service other than those shown above are on attached sheet.

N. Y., AUGUST 10, 1916.

No. 797.

In the

# Supreme Court of the United States

**October Term 1916.**

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FRANCIS M. WILSON, United States Attorney for the Western District of Missouri, *Appellant,*

vs.

ALEXANDER NEW and HENRY C. FERRIS, as Receivers of the Missouri, Oklahoma & Gulf Railway Company, *Appellees.*

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*Appeal from the District Court of the United States for the Western District of Missouri.*

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## SUMMARY OF APPELLANT'S ARGUMENTS.

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### STATEMENT.

1. This controversy arises out of the passage of an Act of Congress (64 Congress, H. R.

17700), approved September 3 and 5, 1916, familiarly known as the Eight-Hour or Adamson Act. It was passed in the face of, and had the effect of averting, a threatened strike of all the railroad employees of the country. It became the subject of great public discussion in the then pending presidential campaign. The carriers could at once have brought a test case, had it here upon the first day of the October, 1916, term, then advanced, argued, and actually decided before January 1, 1917, the date the Act was to take effect. They preferred to first take their chances with the election. Thereafter, they banded together for a common cause, and concluded not to obey it as they promised the Senate Committee (Senate Document 549, pp. 77, 93) to do nor make an effort for any speedy test, but to institute *innumerable* suits (practically one by *each* carrier in *each* district where it operated) for temporary and permanent injunctions against the enforcement of the Act. Out of the situation thus created, the Government, by the aid of a just judge, was enabled to bring here for prompt decision, this case, now about to be stated, and put a stop to the needless, expensive and dilatory litigation already precipitated and also threatened.

2. Appellees, receivers of the Missouri, Oklahoma & Gulf Railway Company, filed in the Western Division of the Western District of Missouri, a bill (Rec. 1) against the appellant, United States Attorney thereof, to enjoin the enforcement of the Act because it was unconstitutional and unworkable. Certain officers of labor union organizations, having no relation to the relief

sought, were (Rec. 1) originally made parties defendant. The case is, however, now free from that complication, because plaintiffs voluntarily dismissed (Decree, Rec. 49) as to them, thus leaving the contest where it should at all times have been, *solely* between the carrier and the Government. Appellant, as the *then* sole defendant below, moved to dismiss because the Act was constitutional and the bill stated no cause of action. The court below (Circuit Judge Hook), without any investigation, upon mere impressions, with expressions of doubt as to the validity of the Act, and as the quickest way to send here a great public controversy, overruled (Opinion, Rec. 52) the motion to dismiss. This was, for all practical purposes, a *pro forma* certification of the case for an early final decision. The ruling was below thus (Rec. 53) simply stated:

> "The assistance of this court has been invoked to facilitate a final and authoritative determination of the constitutional question. The case was presented but yesterday, and a decision is desired today. It is far from being an agreeable duty for a judge to record a judicial conclusion without the care and deliberation essential to a conviction that he would stand to in every circumstance. * * * Upon a consideration of the Adamson law and of what is said of its practical effect and what was intended to be accomplished by it, the judgment is that, as the court construes the terms of the law, it cannot be sustained."

This decision, thus hurriedly made, erroneously presumed invalidity, instead of validity, as required

by settled rules (Legal Tender Cases, 120 Wall. 457, 531; Trade Mark Cases, 100 U. S. 96; *Nicol* v. *Ames,* 173 U. S. 509, 514, 515; First Employers Liability Cases, 207 U. S. 463, 511), but it brought the controversy to a head, the court below evidently thinking (*Cambers* v. *Waterman,* 8 Phila. 82 [Pa.]) it could better facilitate an early hearing here by making the Government the moving party. Appellant elected (Rec. 49) to stand upon the order overruling the motion to dismiss. A final decree (Rec. 49) was, upon November 22, 1916, entered, enjoining him from enforcing the Act against appellees. From such result, this appeal (Rec. 50) is prosecuted. The receivers, appellees here, had been appointed by the judge then presiding below. He required (Opinion, Rec. 53) them to aid appellant in obtaining an advancement here, thus putting a stop to the flood of litigation which had been unnecessarily precipitated, and giving an early opportunity to relieve the public mind of any doubt of the power of Congress to deal or not to deal with the subject of the Act. The language used below, as to this phase of the case (Rec. 53), was this:

> "The case in which the plaintiffs were appointed receivers is in charge of the judge who is acting here. An order will be entered in that case directing plaintiffs and their counsel to co-operate with the Department of Justice in lodging the appeal in the Supreme Court by December 4th, next, and in then moving for the advancement thereof for such early hearing as that court may find it consistent to grant; also to invite counsel for all railroad companies and others similarly inter-

> ested in the question involved to participate in the presentation of the motion to advance, and in the arguments on the merits as fully as though their clients were parties to this litigation. Though the decree of the court in the case here will be final in form, yet because of the exceptional circumstances the plaintiffs will be directed to keep their accounts and be prepared promptly to pay their employees on the basis of the Adamson law should the decree not be sustained."

Pending the appeal, the appellees were thus required (Opinion, Rec. 53) to so keep their accounts as to be prepared, in case of reversal, to pay their employees on the basis of the Adamson Act; after the advancement of the case, they were (Rec. 53) to permit, as they are now doing, the other carriers to participate in the presentation here.

3. As already stated, innumerable like cases, where one, as a test, would have been sufficient, had been instituted and were still threatened by the various other carriers of the country, with union labor officials, for some undisclosed purpose, made defendants thereto. All these carriers concluded to adopt the suggestion made by Judge Hook to speed a hearing as to the constitutionality of the Act, here and in this cause, and to yield to the insistence of the Government to stay *all* action against any one in the many vexatious and unnecessary suits, whether theretofore filed or thereafter to be instituted. So, for the privilege of being here heard herein, and in order to silence any *possible* fear of *immediate* suits for penalties,

which the bill fails to show any threats to bring, these carriers joined the parties to this action in this stipulation:

> "The Attorney General of the United States and counsel for appellees and counsel for the various railroads and receivers which have instituted proceedings to enjoin the enforcement of the so-called Adamson Law, hereby stipulate as follows:
>
> 1. For the purpose of obtaining at an early date the opinion and judgment of this court upon the questions presented by the record in this case, more especially upon the constitutionality of the said Adamson Law, the appeal herein shall be prosecuted with all convenient speed and all parties will co-operate to this end, and on December 4, 1916, join the Government in asking the court that it be advanced for argument at the earliest possible date.
>
> 2. Any additional contracts or schedules under which the employees and the several railroads are now working which do not appear in the present case, but which counsel for either side may deem to be necessary to illustrate the provisions of the Act, may be submitted for consideration in the argument and presentation of the present case, provided that the opposite side is served with copies thereof not later than December 4, 1916.
>
> 3. Pending the disposition of this case all like cases now brought on behalf of the several railroads parties to this stipulation shall remain in *statu quo* and no further cases of the same or like character shall be instituted by them prior to such disposition.

4. Pending such disposition herein no prosecution shall be instituted by the United States nor any conviction sought under Section 4 of said Act.

5. In each pending case except this a consent order shall be entered continuing further action therein until the decision of this court, and providing that plaintiff from on and after January 1, 1917, shall keep its books and accounts in such manner that, if the constitutionality of the Act is upheld, it shall ascertain the amount due to the employees affected under the construction placed upon the Act by this court and shall promptly pay them said amounts, which right can at any time be enforced for their benefit on their own motion or on the motion of the defendant United States Attorney.

6. By the consent of the court appointing them, the receivers in this case, through their counsel, Arthur Miller, hereby designate Walker D. Hines, the Chairman of the Committee of Counsel representing the railroad companies and receivers which have instituted the proceedings hereinabove referred to, as co-counsel to have charge with him of the presentation of this case for appellees in this court. Said Miller shall have complete charge of this case so far as concerns the advancement, in the efforts for which said Hines shall join.

7. Any railroad not a party hereto may become such by filing with the Attorney General of the United States notice of its concurrence in the provisions hereof."

The transcript having in the meantime, during the November vacation, been here filed, the Government, when the court reconvened upon Decem-

ber 4, 1916, presented a motion to advance, which was concurred in by appellees and by all the other carriers. This motion was, upon December 11, 1916, sustained, and the case is now ready for argument.

4. Pursuant to the stipulation (par. 2) both sides have designated and filed for use, not as part of the record, but as *illustrations in argument*, the schedules of carriers other than the appellees. Those designated by the carriers are:

(a) Eastern roads: Boston & Maine, Erie, Pittsburgh & Lake Erie, New York, New Haven & Hartford and Pennsylvania.

(b) Western roads: Illinois Central, Denver & Rio Grande (Colorado Line), Northern Pacific, Southern Pacific (Pacific System), Atchison, Topeka & Santa Fe (East and West and Coast Lines), Gulf, Colorado and Santa Fe, Missouri, Oklahoma & Gulf, Chicago, Milwaukee & St. Paul and Chicago, Burlington & Quincy.

(c) Southeastern roads: Louisville & Nashville, Atlantic Coast Line, Chesapeake & Ohio and Southern.

Those by the Government:

(a) Eastern road: Delaware, Lackawanna & Western.

(b) Western roads: Southern Pacific (Atlantic System), San Antonio & Aransas Pass, International & Great Northern, El Paso & Southwestern, Houston East & West Texas, Houston & Texas Central, and St. Louis, Brownsville & Mexico.

(c) Southeastern roads: Central Georgia, Seaboard Air Line, Florida & East Coast, Norfolk

& Western, Alabama & Vicksburg, Atlanta, Birmingham & Atlantic, Charleston & Western Carolina, Georgia Railroad, Georgia & Florida, Georgia, Southern & Florida, Gulf & Ship Island, New Orleans Great Northern, New Orleans & Northeastern, Norfolk Southern, Richmond, Fredericksburg & Potomac, Tennessee Central and Vicksburg, Shreveport & Pacific.

The use of none of these schedules is necessary, because every phase of the case and effect of the Act appears from the face of the bill, the exhibits thereto, and those documents, referred to herein, of which the court will take judicial notice.

5. The *broad* question presented, as recognized by the stipulation (par. 1) and the course pursued below, is whether the Adamson Act is unconstitutional, because it destroys the carriers' liberty of contract, there being neither averment nor claim that the alleged increased expense caused thereby is in any respect confiscatory. The carriers, however, also make some claim that it is "unworkable," whatever that word means, and thereby seek to interject herein the proposition that even if there was a valid exercise of power, there is such doubt as to its meaning that its enforcement is impossible. This, they contend is sufficient for a court, *in limine,* without any test or *threatened* invasion of rights, and for the simple asking to stay, by injunctive process, the enforcement of the same.

They overlook the fact that such a case is plainly one against the United States (*Fitts* v. *McGhee,* 172 U. S. 516, 525-532), having none of

those elements of rate accounting, pending which the enforcement of penalties may *sometimes* be restrained. (*Smyth* v. *Ames,* 169 U. S. 466; *Ex parte Young,* 209 U. S. 123, 147; *Missouri Pacific R. Co.* v. *Tucker,* 230 U. S. 340, 350.) However, the questions presented will in their order and broadest aspects be separately and fully considered.

## ASSIGNMENT OF ERRORS.

The errors assigned are (Rec. 50) that the court below erred

1. In not sustaining the motion to dismiss.
2. In not entering a decree dismissing the bill.
3. In not upholding the validity of the Act of Congress approved September 3 and 5, 1916, commonly known as the Adamson Act.
4. In enjoining the appellant as prayed in the bill.

## ARGUMENT.

### I.

### The Act.

(1) The Act (Rec. 7-8) reads:

"An Act to establish an eight-hour day for employes of carriers engaged in interstate and foreign commerce, and for other purposes:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the Act of February fourth, eighteen hundred and eighty-seven, entitled 'An Act to regulate commerce,' as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, from any state or territory of

the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States: PROVIDED, That the above exceptions shall not apply to railroads though less than one hundred miles in length whose principal business is leasing or furnishing terminal or transfer facilities to other railroads, or are themselves engaged in transfers of freight between railroads or between railroads and industrial plants.

Sec. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard work-day as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months, nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; that each member of the commission created under the provisions of this Act shall receive such compensation as may be fixed by the President. That the sum of $25,000.00 or so much thereof as may be necessary, be, and hereby is appropriated out of any money in the United States Treasury not otherwise appropriated, for the necessary and proper expenses incurred in connection with the work of such commission, including salaries, per diem, traveling expenses of members and employees, and rent, furniture, office fixtures and supplies, books, salaries, and other nec-

essary expenses, the same to be approved by the chairman of said commission and audited by the proper accounting officers of the Treasury.

Sec. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour work-day shall not be reduced *below the present standard day's wage*, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the *pro rata* for such standard eight-hour work-day.

Sec. 4. That any person violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not less than $100.00 and not more than $1000.00, or imprisoned not to exceed one year, or both."

(2) A close analysis of the Act shows clearly that by its terms:

(a) It applied only to the "employees" *actually* engaged, in any capacity, in the *dangerous* occupation of *operating* railroad trains in interstate commerce, thus putting aside the objection found in the First Employer's Liability Cases, 207 U. S. 463, that there was not made any distinction between state and interstate acts as well any claim that it dealt with the rights of those who bore only an *indirect* relation to commerce. It dealt with an occupation, the very service in which was of such a character as to justify special consideration as to the employee's hours of service (*B. & O. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612) in an *act* or *train movement* which

was not only *directly* related to, but was part of commerce (*Infra* Div. 111, par. 4, subd. b) itself.

(b) After January 1, 1917, eight hours was, in the title of the Act, recited as established, while the body thereof declared it should be deemed to be a day's work. It was *in addition* thereto, as, without the declaration, it would have been, also made the measure and standard for the reckoning compensation therefor, the parties being left free to determine the amount per day to be paid.

(c) A qualified commission was to make a reasonable test of the working of the law for a period of six to nine months, by observing, and, within thirty days thereafter, reporting, to the President its operation and effect; a provision not only reasonable and necessary, but sufficient to prevent, pending the test, suits to restrain its enforcement (*Knoxville* v. *Water Co.*, 212 U. S. 1, 16-19; *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19, 41, 54, 55), and, if the power to deal with hours of service be conceded, the provision therefor was one wholly within the domain of legislation, as shown by the opinions of Mr. Justice Day, in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, and Judge Hough in the same case below (157 Fed. Rep. 432, 438). Such also is the result of other cases (*Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298; *Wadley Southern R. Co.* v. *Georgia*, 235 U. S. 651; *Rail & River Coal Co.* v. *Yaple*, 236 U. S. 338) where the courts have refused to interfere pending hearings before the interstate and state railway commissions.

(d) *Pending* such test and report, and for thirty days after its completion, *not permanently*, the total day's wage was not to be reduced below the then existing standard, and extra time over eight hours was to be paid at a rate not less than the *pro rata* of the eight-hour day, this as a *mild* penalty against overtime employment (*State* v. *Bunting*, 71 Ore. 259, 139 Pac. Rep. 731, 736; statements of A. B. Garretson, Senate Document 549, p. 31; and W. G. Lee, *id.* 63), not as marked as would have been the one and a half extra time, demanded by union labor in the negotiations to which reference is hereafter made.

(3) As indicated by the title of the Act, the first section *established* eight hours as a day's work. This was the primary purpose. Without more, from a *practical* railroad standpoint, those hours *automatically* became the measure and standard for reckoning compensation under the existing schedules. The Act, however, though it was wholly unnecessary and really surplusage so to do, *also* expressly declared that the eight hours so fixed should be such measure and standard. As already remarked, the *amount* to be paid was not fixed. The third section was all that dealt therewith, and this only, indirectly and *pending* the governmental test. During *that* period, but no longer, the amount of the present day's wages was not to be reduced below the *then* standard, but each extra hour *after* eight hours of each day, was, during such test period, to be paid for at a rate of one-eighth of the total day's wage.

II.

**The questions presented and that which may be considered in determining same.**

(1) *Questions presented.*

The suit is, as has already been observed, really against the United States (*Fitts* v. *McGhee*, 172 U. S. 516, 525, 532) and has none of the elements of rate accounting pending which the enforcement of penalties may be restrained. (*Smyth* v. *Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123, 147; *Missouri Pacific R. Co.* v. *Tucker*, 230 U. S. 340.)

The bill (Rec. 8, 9) asserts that the Act is unconstitutional because it (a) deprives the carrier of its liberty to contract, and is not a regulation of commerce; (b) makes an improper classification of railroads; (c) provides in section 4 for drastic penalties, and (d) is unworkable. Time need not be consumed nor space occupied considering the alleged improper classification, heretofore, in principle decided (*C. B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 574; Second Employers' Liability Cases, 223 U. S. 1, 53; *C. & O. R. Co.* v. *Conley*, 230 U. S. 519, 522; *Keokee, etc., Co.* v. *Taylor*, 234 U. S. 224; *Atlantic C. L. R. Co.* v. *Georgia*, 234 U. S. 280; *Hendrick* v. *Maryland*, 235 U. S. 610; *Jeffery Mnfg. Co.* v. *Blagg*, 235 U. S. 571; *Miller* v. *Wilson*, 236 U. S. 373) against appellee's contention, which should again be done in a case where "the law" so accurately "hits the evil" "where experience shows it to be most felt" (*Keokee, etc., Co.* v. *Taylor*, 234 U. S. 224; *Miller* v. *Wilson*, 236 U. S. 373); nor the objection that the provisions for penalties were illegal, though they are

not so great as to justify a holding that they are void (*Grand Trunk R. Co.* v. *Michigan Railroad Commission,* 231 U. S. 457; *Ohio Tax Cases,* 232 U. S. 576; *Rail & River Coal Co.* v. *Yaple,* 236 U. S. 338; *Armour & Co.* v. *North Dakota,* 240 U. S. 510; *St. L. I. M. & S. R. Co.* v. *Arkansas,* 240 U. S. 518); because, if well taken, that would do no more than temporarily *suspend* the operation of section 4 (*C. & O. R. Co.* v. *Conley,* 230 U. S. 513) and not affect (*Southern R. Co.* v. *Campbell,* 230 U. S. 537, 552; *L. & N. R. Co.* v. *Garrett,* 231 U. S. 298, 311; *Phoenix R. Co.* v. *Geary,* 239 U. S. 277) the rest of the Act, and would not authorize a suit before there was an attempt to enforce same (*Phoenix R. Co.* v. *Geary,* 239 U. S. 277); nor the claim of unworkability regardless of the test provided, such opportunity for a test being here regarded (*Knoxville* v. *Water Co.,* 212 U. S. 1, 16-19; *Willcox* v. *Cons. Gas Co.,* 212 U. S. 19, 41, 54, 55) as an insuperable objection to the immediate assertion of the claim of the unconstitutionality of the statute. (*Infra* Div. IV.) Therefore, that with which the parties are now concerned is whether the Act does improperly deprive appellees of their liberty of contract, and, if it does not, shall it be construed to be so unworkable as to make it absolutely void? In approaching a consideration of these questions, it may be wise to consider, with the aid of that of which judicial notice may be taken, the existing terms of employment, the controversy which arose thereover, the intervention of the President of the United States, his message to Congress, and the legislative consid-

eration of the situation, all immediately prior to the passage of the Act.

(2) *Judicial notice.*

Since the constitutionality of the Act is the broad question to be met and decided, it should, in approaching the discussion thereof, be remembered that judicial notice, when taken, can and must be so done, even as against the averments of contrary conclusions in a pleading. (*U. S.* v. *Flournoy, etc., Co.,* 71 Fed. Rep. 576, 577-578.) Such notice is taken of matters of general knowledge, industrial, social, political and economic conditions and changes and the general methods and course of business (7 Enc. Ev. 931, 934, 935, 938, 962), general facts relating to travel and transportation, including the ordinary speed of trains and the mode and incidents of their operation, as well as the facilities between certain points and the time required for transportation (*id.* 933, 941), public acts, books, journals and records of legislative departments and the messages of the executive (*id.* 960, 983, 984, 993), the object and conditions intended to be remedied by legislation, including any general condition which might aid in construction (*id.* 961), the history of the country and the law, and the public necessities which caused a legislative enactment, as well as the public discussion relative to its passage and the reasons given therefor (*id.* 962). So this court, recognizing these principles, has expressly said that its justices have power to refresh their memories and inform their consciences from such sources as they deem most trustworthy (*Jones* v. *U. S.*, 137 U. S. 202), and for such purposes, to

resort to such information as they may deem proper (*Brown* v. *Piper,* 91 U. S. 37), taking judicial notice of common experience and knowledge (*Brown* v. *Piper,* 91 U. S. 37; *Phillips* v. *Detroit,* 111 U. S. 604), legislative journals (*South Ottawa* v. *Perkins,* 94 U. S. 260; Railroad Tax Case, 8 Sawyer, 293, 13 Fed. Rep. 722, 767), public documents of a state before its annexation, and other historical facts in reference to boundaries in dispute between it and another state (*Coffee* v. *Groover,* 123 U. S. 1), the archives (*Underhill* v. *Hernandez,* 168 U. S. 250), rules and regulations (*Caha* v. *U. S.,* 152 U. S. 211, 221, 222), and records (*The Habana,* 175 U. S. 677, 696) of a department, as well as official statements of the head thereof (*Heath* v. *Wallace,* 138 U. S. 573), and proclamations and messages of the President. (*U. S.* v. *The Three Friends,* 166 U. S. 1, 64, 65; *Jenkins* v. *Collard,* 145 U. S. 546; *Jones* v. *U. S.,* 137 U. S. 202, 212, 215; *Armstrong* v. *U. S.,* 13 Wall. 154.) Suffice it then to say, it is proper, as an aid to construction, to consider, in case of doubt, the controversy between the carriers and unions which caused the legislation, the propositions (Exhibit "A," Bill, Rec. 17-18; Senate Document 549, 64 Congress, 1st Session, pp. 39-42) of the respective parties, the message of the President (Exhibit "B" to Bill, Rec. 18-23), the proceedings before the Senate Committee (Senate Document 549, 64 Congress, 1st Session), and the reported proceedings (Senate Document 493, 64 Congress, 1st Session) previously had under the Mediation and Arbitration Acts.

(3) *The causes which prompted the passage of the Act, and the public steps taken in the course of its enactment.*

(a) The contractual relations between the carriers and their employees have for years been represented in schedules or contracts made by the former with the labor organizations for the benefit of the latter. Contests between capital and labor have been frequent and generally of long standing. To meet the same, boards of conciliation and mediation exist under and have been provided for by the Acts of October 1, 1888 (25 Stat. L. 501), March 4, 1911 (36 Stat. L. 1397), June 1, 1898 (30 Stat. L. 424), and July 15, 1913 (38 Stat. L. 103), those of March 4, 1911, and July 15, 1913, being respectively known as the Erdman and Newlands Acts. All these, with the current workings thereof and the mediations and arbitrations had thereunder, appear in Senate Document 493 (64 Congress, 1st Session) under the title, "Railroad Labor Arbitrations: Report of the United States Board of Mediation and Conciliation on the effects of arbitration proceedings upon the rates of pay and working conditions of railroad employees." Both capital and labor must be always treated fairly, yet labor, having less power, must, to be effective, act through organizations. This is axiomatic. The thought was distinctly expressed by Mr. Justice McKenna and Mr. Justice Holmes in their dissents in *Adair* v. *U. S.*, 208 U. S. 161, 180-190, 190-192, and has been frequently legislatively recognized. This thought has also for many years been acted upon by the rail carriers, by making contracts with their employees

through the unions, as their representatives. These organizations have often and long contested for various concessions, rights and privileges of their members until they are all now, in the minutest detail, guarded by contracts between them and the carriers. These contracts are called schedules and specify no time of duration. They so measure and standardize time that hours of service are, by mathematical calculation and precision, readily ascertained, even by the plain and unlearned mind. The words "hours a day," whether eight or ten, in railroad parlance, is as plain to the operatives as "legal holiday" to the banking clerk, or "vacation" to the judicial mind. For years, there was upon each road some such schedules, showing some bases or standard which measured compensation in the mileage made, coupled with its equivalent in hours of service. These schedules bound both the employees for, and the carrier with whom they were made, not only as to such bases, standards and measures, but also as to the method and terms upon which business should be done. They granted the men many concessions, rights and privileges. These were previously gained, but only after long persuasion and heated contests. The President (Message, Rec. 19) described them as "certain privileges now enjoyed by their men and certain bases of payment worked out through many years of contest"; the President of the Brotherhood of Railway Conductors (Senate Document 549, p. 30) said of them:

> "There are a series of allowances that through the years have been built up by those men who are required to give more than the

> equivalent of a day's labor for a day's wage, that they shall be paid arbitrarily for that service certain allowances, an hour for this and an hour for that. These proposals embrace all of those things that the men have enjoyed for years and which were granted to them as a question of equity."

Whatever their true name, the employees guard these privileges as almost sacred rights which (*id.* 31) they "have enjoyed for years," and "intend to enjoy" as long as they "are a power." Some of these long time concessions (Exhibits 1, Rec. 23-38, and 2, Rec. 38-48) to engineers or firemen or both are: Allowances for terminal work or delays, deadheading, watching engines, loading or unloading stock or material, attending court, doubling hills or running for coal or water, breaking in engines, running light engines, special services, calls for duty without assignment to work, work train service, tie-ups, provisions for free transportation, seniority rights, eating and sleeping accommodations, ice and conveniences on engines, letters on leaving the service, investigation before being disciplined or discharged, adjustment of grievances, freedom from fines, leaves of absence and arrangements for calls to service, and assurances against unreasonable delays away from home, for reasonable time at meals, and of fair efforts to require the principal and all Sunday layovers to be at the employee's home. These schedules are in the same *general* form as to all the carriers. Those which appellees have in force appear as Exhibits 1 and 2 (Rec. 23-48) to the bill. They, with some exceptions as to detail, are fair exam-

ples of all. Such schedules upon some of the roads have, in the past, been the subject of various objections thereto and desired changes therein, and often the subject of discussion, controversy, mediation and arbitration (Senate Document 493, 64 Congress, 1st Session, pp. 7-599). A mere reading of the reports of these arbitrations will make plainer than argument could the nature of these privileges, and the reasons for the men guarding their rights thereto. The schedules, besides giving the foregoing and other special privileges, measure terminal or yard service, in no wise dependent on mileage, by the actual hours of service. The actual passenger train service is upon a mileage basis; *i. e.*, a fixed sum is paid for so many miles, or less, at the rate of a given number of miles per hour, making it a mere mathematical problem to calculate the hours of service; on account of greater speed per hour of the passenger train, the day's work when reduced to hours, is less than in the freight service, and less than eight or ten hours; for instance, one hundred miles at eighteen miles an hour, means five and five-ninths hours a day; twenty miles an hour, five hours, and twenty-five miles an hour, four hours a day. For the actual freight train service, the measure of compensation has been, in *most* instances, stated to be "ten hours or less a day, *or the equivalent*, one hundred miles or less at ten miles per hour." (Bill, Rec. 9, 10, 12; Exhibits 1, Rec. 23-38, and 2, Rec. 38-48; Statements for the Unions, A. B. Garretson, Senate Document 549, pp. 31-37; W. G. Lee, *id.*, pp. 66, 68; W. S. Carter, *id.*, pp. 142-

143; Warren S. Stone, *id.*, pp. 153, 154; for the carriers, Elisha Lee, *id.*, pp. 83-84, 86-87.)

As put (Rec. 9-10, 12) in the bill:

> "If a run is less than 100 miles, said employees are paid for 100 miles, and if a run of 100 miles, or less, requires more than ten hours, said employees are paid over-time for the time in excess of ten hours, it being the principle of the contract that the employees are obligated to work as long as ten hours, if necessary, for the purpose of making a run of 100 miles, or less, and for such ten hours, they are to receive 100 miles pay. If (as is generally the case), a run exceeds 100 miles and if such run is not made at an average speed of ten miles per hour, said employees will be paid over-time for the time in excess of what would have been required if the run had been made at an average speed of ten miles per hour. All overtime is computed on the principle that each hour of overtime entitles such employee to pay for 10 miles. * * * If a run is less than 100 miles, said employees are paid the rate for 100 miles; if a run of 100 miles, or less, requires more than ten hours, said employees are paid overtime *pro rata* for the time in excess of ten hours."

The lines of thirty carriers in the south, with a mileage of 32,035, were, when the Act was under consideration by the Senate committee, being actually, in certain service, operated upon an eight-hour basis. (Statement W. S. Carter, president of Brotherhood of Locomotive Enginemen and Firemen, Senate Document 549, 64 Congress, 1st Session, pp. 142, 143; Elisha Lee, chairman of

the Carriers' Committee of Carriers' Managers, *id.* 154.) Mr. Elisha Lee (*id.* 154), for the carriers, actually produced a "statement showing the roads having service other than ten miles per hour," which Mr. Thom, chief counsel for the carriers, said (*id.* 154) was "eight hours or less a day, *or the equivalent,* 100 miles or less, at 12½ miles per hour."

(b) In June, 1916, the unions demanded that all ten-hour, or more than eight-hour, freight train and terminal service schedules, be reduced to eight. Extended negotiations were conducted by the unions and a committee of the carriers' executives. There was a failure to agree. The Board of Mediation intervened, but without success. The President, to avoid a threatened strike, called in the contending parties. The unions' demand, designated as No. 35 (Exhibit "A," Bill, Rec. 17-18, Senate Document 549, 64 Congress, 1st Session, pp. 39, 40) was a plain, simple thing. In railroad or schedule language, known to both sides of the controversy, and to every operative in the country, it called for the substitution of the eight-hour day for the existing ten, but reserved *all* the terms of existing schedules "more favorable to the employees," and *all* those privileges for which they had made long contests and which had been theretofore yielded them. The demand was to reduce the hours in the freight and terminal service from ten to eight—not to increase those of four, five and six in the passenger train service to eight. The carriers, without question as to what the proposition was, made a counter proposal (Memorandum B, Senate Document 549, 64 Con-

gress, 1st Session, pp. 40, 41) for arbitration—not *alone* of the demand for a *reduction* of existing ten hours to eight, but *also* of those various privileges contained in the schedules, which had, by them, long theretofore been yielded. The bill (Rec. 1) *concealed* this fact by not stating what the carriers' proposition was, leaving the impression with a casual reader that the unions demanded the eight-hour service and the carriers wished, but the unions refused, to arbitrate that *single question*. Such seems to have been the thought of shippers, civic bodies and other outsiders who, in aid of the carriers and at their instigation, appeared before the Senate Committee (Senate Document 549, 64 Congress, 1st Session), as well as the general impression some people sought to make on the public mind. But, as shown both by the carriers' proposition (Senate Document 549) and the President's message to Congress (Bill, Exhibit "B," Rec. 18-23), they were, in fact, not willing to arbitrate the eight-hour proposition unless they could *also* include in the arbitration those special privileges theretofore granted and about which neither side had made any complaint.

(c) The Board of Mediation not having accomplished anything, the President, in the hope of adjusting matters, had the parties brought in conference with him. The issue then was this: The men demanded eight instead of ten hours a day and, as a penalty to insure short hours, one and one-half overtime. The carriers demanded arbitration, not only of this specific proposition, but *also* of the various concessions theretofore

granted by them and which were in no wise affected by or related to the demand. No good reason appears why anyone should have countenanced the carriers' position. As Mr. A. B. Garretson (Senate Document 549, p. 31), one of the spokesmen of the unions, very well said:

> "Can you imagine men who have enjoyed payment for a certain service for a long series of years agreeing to arbitrate as to whether or not they will take away that which is an equivalent for the amount of money that is involved in the shortening of the day? Not if he is human, he will not."

The President did not agree with the carriers in their view. He, however, suggested (Senate Document 549, p. 41; Message, Rec. 22), to which the unions agreed (*id.*) a concession of the eight-hour demand and a postponement of the extra time on a one and one-half basis until there could be had an investigation of the whole subject. The carriers concurred in the suggestion of an investigation, but *only* on the one-sided condition that they could postpone any adoption of the eight-hour principle, and be permitted, *after* the result became known, to *then* decide what, *if anything*, they would do. This really left remaining nothing but legislative action or a strike. The President then delivered a message (Bill, Exhibit "B," Rec. 18-23) to Congress. After reciting the futile effort made by him, the exact points at issue, as hereinbefore outlined, the respective positions of the parties, he declared for the eight hours, with an investigation in the

meantime, *pending* which the amount of a day's wages should not be reduced, extra time to be paid on the same basis without the stronger penalty of one and a half times, demanded by the unions. The Senate committee heard both sides (Senate Document, 549, 64 Congress, 1st Session). The great issue presented was the substitution of eight for ten hours, where applicable in all *existing* schedules, which were in fact in those applying to the freight train and the terminal service. The *only* answer of the carriers was that they could not stand the great increase in expense which would be caused by the change. There was not an intimation that a single item of expense would be decreased. A report was made favorable to the bill. Debates were then had in both houses (53 Congressional Record, 64 Congress, 1st Session, pp. 15611-16275). The Act was then adopted, the strike called off and the Commission provided for appointed.

There is not a shadow of doubt, in the light of general knowledge and current history, that the men had prevailed in their specific demand to have the eight instead of the ten-hour service, on all the remainder of the lines of the country just as it already was in force in certain service on the thirty-two and odd thousand miles in the south.

## III.

### The Power of Congress to Act.

We are thus brought to the great question in the case, *i. e.*, the power of Congress to act.

(1) The Act, as indicated both by its title and context, absolutely established eight hours as a day's service. From this, without more, it followed, even without the provision which was made, that the eight hours thus fixed, necessarily became, in railroad practice, the measure and standard of compensation. The latter declaration neither added to nor detracted from the establishment of the hours of service; it merely emphasized the thought and put it into action. Assuming, as one must (*B. & O. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612) that Congress has power, as it has, to fix the hours of service, it can, of course, make an absolute limitation upon them. This necessarily includes the power to make a milder provision, because the greater always includes the less. Hence the provision for overtime in no wise changed the effect of the limitation as to hours. Comparatively few of such acts impose absolutely limitations on such hours. Each contemplates as strict a limitation as is reasonably compatible with the conditions to be met. Thus the sixteen-hour law (34 Stat L. 1415) allows railroad overtime in case of unforeseen emergencies, just as the new law contemplates, when the eight hours expire. The latter, in principle, differs only in degree of rigidity from those hours of service Acts which have been here (*B. & O. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Sturges* v. *Beauchamp*, 231 U. S. 320; *Riley* v. *Massachusetts*, 232 U. S. 671; *Hawley* v. *Walker*, 232 U. S. 718; *Miller* v. *Wilson*, 236 U. S. 373; *Bosley* v. *McLaughlin*, 236 U. S. 385; *Holden* v.

*Hardy,* 169 U. S. 366; *Atkin* v. *Kansas,* 191 U. S. 207; *Muller* v. *Oregon,* 208 U. S. 412), and by the states (*State* v. *Bunting,* 71 Ore. 259, 139 Pac. Rep. 731; *State* v. *Shorey,* 48 Ore. 396, 86 Pac. Rep. 881; *Commonwealth* v. *Hamilton Mfg. Co.,* 120 Mass. 383; *Commonwealth* v. *Riley,* 210 Mass. 387, 97 N. E. Rep. 367; *In re Ten Hour Law,* 24 R. I. 603, 54 Atl. Rep. 602; *Ex Parte Boyce,* 27 Nev. 348; *Ex Parte Kair,* 28 Nev. 417, 425, 80 Pac. Rep. 463, 82 Pac. Rep. 453; *Short* v. *Mining Co.,* 20 Utah 24; *Wehham* v. *State,* 65 Neb. 394, 91 N. W. Rep. 421; *State* v. *Buchanan,* 29 Wash. 602, 70 Pac. Rep. 52; *Ritchie* v. *Wayman,* 244 Ill. 509, 91 N. E. Rep. 695; *People* v. *Schweinler Press,* 214 N. Y. 395, 108 N. E. Rep. 639; *People* v. *Klinch Packing Co.,* 214 N. Y. 121, 108 N. E. Rep. 278; *State* v. *Cantwell,* 179 Mo. 245; *State* v. *Lumber Co.,* 102 Miss. 802, 59 So. Rep. 923, 103 Miss. 263, 60 So. Rep. 215) upheld. This new law recognizes the present impracticability in railroad service of a strict iron-clad, no more, no less, eight-hour day; it seeks to put into effect the eight-hour rule wherever and to the extent practical conditions permit, just as has been done with ten hours; to accomplish the result, overtime pay is imposed for all service beyond eight hours; this as a mild penalty (*State* v. *Bunting,* 71 Ore. 259, 139 Pac. Rep. 731; statements of A. B. Garretson, Senate Document 549, p. 31, and W. G. Lee, *id.* 63), the tendency of which will be to limit the service to eight hours wherever practicable. The Act, differing from other hour laws only in degree, was only

intended to fix a limit *beyond* which the carrier should not go. When so considered, *B. & O. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, sustaining the sixteen-hour law, is all the authority needed to sustain the act; this without the necessity of any further or extended argument.

(2) Regardless of that which has just been said, we pass to the broad discussion which the carriers invite. They deny the existence of the power to regulate the hours of service, and at the same time make them, as the carriers have for years done, bases, measures or standards of compensation. Their claim is that the fifth amendment, in guaranteeing "liberty of contract," gives them the *absolute* right, free from legislative interference, to contract with their employees on such terms, bases, or standards as they deem proper. This liberty of contract, when unrestrained by any special grant of power in the Constitution, has often been recognized and fully protected. (*Allgeyer* v. *Louisiana*, 165 U. S. 578; *Lochner* v. *New York*, 198 U. S. 45; *Adair* v. *U. S.*, 208 U. S. 161.) But such liberty, being far from an unbridled license, is always subject to such laws as may be enacted by Congress in the exercise of some special power delegated to it, or even by a state in the exercise of its police or some other special power for the benefit of the people. So where, as here, there has been so delegated to Congress the broad power "to regulate commerce" (Constitution, Art. 1, Sec. 8, Clause 3) and "to make (*id.* Clause 18) all laws which shall be necessary and proper

for carrying" that power "into execution," this freedom of contract has always been subjected to congressional legislation enacted by the way of a regulation of commerce. (*Frisbie* v. *U. S.*, 157 U. S. 160, 165; *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 572, 573; *Hopkins* v. *U. S.*, 171 U. S. 578, 603; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 228, 229, 230; *Patterson* v. *The Eudora*, 190 U. S. 169, 174; *Atlantic C. L. R. Co.* v. *Riverside Mills*, 219 U. S. 186, 201-203; *B. & O. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618, 619.) When a state, in the interest of the public, reasonably exercises its legislative power, in matters where it has the same power to act as Congress has in respect to commerce, freedom of contract has been likewise restricted. (*McLean* v. *Arkansas*, 211 U. S. 539, 547; *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467; *C. B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 566-568; *Schmidinger* v. *Chicago*, 226 U. S. 578; *Erie R. Co.* v. *Williams*, 233 U. S. 685.)

(3) The practical application of the foregoing principles to situations heretofore here considered, would seem to remove all doubts, for it has been recognized that:

(a) Freedom of contract must yield to congressional requirements as to the fees of pension attorneys (*Frisbie* v. *U. S.*, 157 U. S. 160), the time and place of paying seamen's wages. (*The Bark Eudora*, 190 U. S. 160), anti-trust prohibitions; (*U. S.* v. *Joint Traffic Association*, 171 U. S. 505; *Hopkins* v. *U. S.*, 171 U. S. 578; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211;

*Northern Securities Case,* 193 U. S. 197; *Standard Oil Co.* v. *U. S.,* 221 U. S. 1; *U. S.* v. *American Tobacco Co.,* 221 U. S. 106; *U. S.* v. *Union Pacific R. Co.,* 226 U. S. 61), exercises of the rate making power (*Interstate Commerce Commission* v. *C. R. I. & P. R. Co.,* 218 U. S. 88; *Houston, etc., R. Co.* v. *U. S.,* 234 U. S., 342), affecting prior contracts, legal when made (*Armour Packing Co.* v. *U. S.,* 209 U. S. 56), as, for instance, existing contracts for passes (*L. & N. R. Co.* v. *Mottley,* 219 U. S. 467), requirements for safety appliances in lieu of existing methods of building and manning cars (*Johnson* v. *Southern Pacific R. Co.,* 196 U. S. 1; *Schlemmer* v. *Buffalo, etc., R. Co.,* 205 U. S. 1; *Southern R. Co.* v. *U. S.,* 222 U. S. 20), as to equipment to be used, even for hauling the carriers' own fuel (*Interstate Commerce Commission* v. *Illinois Central R. Co.,* 215 U. S. 452), and for the distribution of cars to shippers (*Interstate Commerce Commission* v. *Chicago & Alton R. Co.,* 215 U. S. 479), charges for elevator services (*Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42) made by orders of the Interstate Commerce Commission, the application of the Employers' Liability Act (34 Stat. L. 232, 35 Stat. L. 65, 36 Stat. L. 291) in lieu of former common law rules (First, 207 U. S. 463, and Second Employers' Liability Cases, 223 U. S. 1), the abolishment of the carrier's former right to limit to its own line its liability for shipments (*Atlantic C. L. R. Co.* v. *Riverside Mills,* 219 U. S. 186, 201-203) and requirements for sixteen hours of service by employees

instead of the previous unlimited time. (*Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612.)

(b) This same freedom of contract must also yield to state action in those matters held not to be against the governmental power, but in aid thereof, and as to which the government *could* act, but had not yet acted, such as the amount of the charges to be made for piloting (*Cooley* v. *Board of Wardens,* 12 How. 299; *Ex parte McNeil,* 13 Wall. 236) and quarantine (*Morgan's S. S. Co.* v. *Louisiana,* 118 U. S. 455) services, and requirements for full railroad crews (*C. R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453) and electric headlights. (*Atlantic C. L. R. Co.* v. *Georgia,* 234 U. S. 280.) That freedom must also yield to like state action fixing rates to be charged by public utilities (*Munn* v. *Illinois,* 94 U. S. 113; *Smyth* v. *Ames,* 169 U. S. 466; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19; *C. B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549), requiring the carriers to pay the salaries of state railroad commissioners (*Charlotte, C. & A. R. Co.* v. *Gibbes,* 142 U. S. 386), measure coal before screening so as to better fix the miners' wages (*McLean* v. *Arkansas,* 211 U. S. 539; *Rail & River Coal Co.* v. *Yaple,* 236 U. S. 338), redeem in cash, store orders issued for wages (*Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13), pay employees in cash at certain rates, when they are discharged (*St. L. I. M. & S. R. Co.* v. *St. Paul,* 173 U. S. 404; *Keokee, etc., Co.* v. *Taylor,* 234 U. S. 224) and at all times, as often as twice a month (*Erie R. Co.* v. *Williams,* 233 U. S. 685),

and in quantity rates as coal is screened, instead of weight before screening, or weight as ascertained in some other way (*McLean* v. *Arkansas,* 211 U. S. 539; *Schmidinger* v. *Chicago,* 226 U. S. 578; *Rail & River Coal Co.* v. *Yaple,* 236 U. S. 338), barring a railway in a personal injury suit from pleading as a defense, the receipt of some fraternal benefit (*C. B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549), prescribing the hours of labor for those employed by the state or its municipalities (*Atkin* v. *Kansas,* 191 U. S. 207), limiting employment in underground mines or workings and smelters and other like institutions, to eight hours a day (*Holden* v. *Hardy,* 169 U. S. 366), or of women in laundries, or women and children in other work, more than a certain number of hours (*Muller* v. *Oregon,* 208 U. S. 412; *Hawley* v. *Walker,* 232 U. S. 718; *Riley* v. *Massachusetts,* 232 U. S. 671; *Miller* v. *Wilson,* 236 U. S. 373), prohibiting the sale or manufacture of cigarettes (*Gundling* v. *Chicago,* 177 U. S. 183), or liquor (*Mugler* v. *Kansas,* 123 U. S. 623), making of option grain contracts (*Booth* v. *Illinois,* 184 U. S. 425), and deductions from actual grain car weights (*House* v. *Mayes,* 219 U. S. 270), and requiring stamps on all board of trade transactions. (*Broadnax* v. *Missouri,* 219 U. S. 285.)

(c) The same reasoning applies to practically the same contention, put in the form of a claim that in some imaginary way there was a taking of property without due process of law, though the bill absolutely lacks any averment that the alleged possible, though untested, increase of ex-

pense was harsh to the extent of any confiscation. The most that is claimed is that there were existing contracts (Exhibits 1, Rec. 23, and 2, *id.* 38) at will with the men, no time of duration being fixed therein. The case made is as nothing when compared with *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 487, where an *existing* contract for a long time pass was held to be annulled by the provisions of the Interstate Commerce Act requiring the payment of cash fares, this Court saying:

> "Long before the above cases were decided it was said in *Knox* v. *Lee,* 12 Wall. 457, 550, 551, that 'as in a state of ownership, subject to the lawful demands of the Sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to the defeat of legitimate government authority.' These principles control the decision of the present question. The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable."

In *C. B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 567, it was said:

> "The right to make contracts is subject to the exercise of the power granted to Congress for the suitable conduct of matters of national concern, as, for example, the regulation of commerce with foreign nations and among the several states."

In *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612, 619, the same idea was thus expressed:

> "And in imposing restrictions having reasonable relation to this end there was no interference with liberty of contract as guaranteed by the Constitution."

Applications of the same principle were made in *Armour Packing Co.* v. *U. S.,* 209 U. S. 56, and *Atlantic C. L. R. Co.* v. *Riverside Mills,* 219 U. S. 186, 202, 203, while in *C. B. & Q. R. Co.* v. *Illinois,* 200 U. S. 561, 593, it was said:

> "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and the right to compensation on account of such injury does not attach under the Constitution."

This principle was given full recognition in *Noble State Bank* v. *Haskell,* 219 U. S. 104.

As hereafter (*Infra,* Div. III, par. 4, subd. a), and by the cases (*Smyth* v. *Ames,* 169 U. S. 466, 526; *Mo. Pac. R. Co.* v. *Kansas,* 216 U. S. 262; *Oregon R. & N. Co.* v. *Fairchild,* 224 U. S. 510,

529; *People* v. *New York, etc., Co.,* 28 Hun. 453; *Loader* v. *Brooklyn Heights Co.,* 14 Misc. Rep., N. Y. 208, 35 N. Y. Supp. 996) shown, the carrier, by the very nature of its *public* undertaking, is bound to give the *public* service, whatever the cost. In fact, the cost of the service, at least up to the point of confiscation, not here pleaded, is wholly immaterial. That service is required for the *public;* the carrier, as a *public* agency, must give it, or else forfeit its right to do business for that *public.* Requiring it to perform its *public* duty does not take its property without due process of law.

(4) From that which has already been said, it follows that the real question is not whether there has been an abridgment of the freedom of contract or any lack of due process of law, but rather, whether there has been enacted something which is a proper regulation of interstate commerce. The power to regulate, "complete in itself" (Second Employers' Liability Cases, 223 U. S. 1, 46), is the simple "right to prescribe the rules under which * * * commerce may be conducted" (*Atlantic C. L. R. Co.* v. *Riverside Mills,* 219 U. S. 186, 201); this in a matter of which Congress has the right of "direct supervision, control and management." (*In re Debs,* 158 U. S. 564, 578.) When that power is exercised, there comes into play a regulation, the definition (6 Century Dictionary & Cyclopedia, 5051) of which is:

> "A rule or order prescribed by a superior or competent authority as to the actions of those under its control; a governing direction."

To regulate (2 Bouvier's Law Dictionary, Rawle's Ed. 863), which is the exercise of the power of regulation, is:

> "To adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws."

To have, then, a *regulation* of wages means (*id.*) to have something which is "in accord with a rule or standard," a *regulation* of commerce being (Bouvier, *id.* 863) merely the making of

> "* * * the rules by which it shall be governed—that is, the conditions upon which it shall be conducted * * *."

Having then in mind that the power being exercised is to be justified as a regulation of commerce, there are these certain fixed principles which will always stand as guiding stars to the intelligent investigating mind:

(a) Commerce "embraces commercial intercourse in all its branches," including the act of transporting passengers and property. (Second Employers' Liability Cases, 223 U. S. 1, 46.) To regulate commerce is to prescribe rules for the conduct thereof (*Atlantic C. L. R. Co.* v. *Riverside Mills*, 219 U. S. 186, 201), or directly supervise, control and manage same. (*In re Debs*, 158 U. S. 564, 578.) Such regulation, when made, is "to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large." (Second Employers' Liability Cases, 223 U. S. 1, 47.) This power of regulation "is complete in

itself" and "extends incidentally to *every* instrument and agent by which * * * commerce is carried on" and "may be exerted to its *utmost* extent over *every* part of such commerce" (*id.* 46, 47), even to the extent of prohibition (*Northern Securities Case,* 193 U. S. 197, 335). It reaches, not only the railroad, its tracks, buildings, engines and cars, and every part thereof, but also the employees (*id.* 47), themselves, who are, therefore, after all, but instrumentalities of commerce. (*id.*)

(b) In prescribing the rules under which such employees shall conduct that commerce (*Atlantic C. L. R. Co.* v. *Riverside Mills,* 219 U. S. 186, 201), of which they are thus (Second Employers' Liability Cases, 223 U. S. 1, 47) an incident to and part and parcel of, and in fixing the terms upon which the Government is to directly supervise, control and manage same (*In re Debs,* 158 U. S. 564, 579), the power is not only "complete in itself," but "subject to *no* limitations save such as are prescribed by the Constitution." (Second Employers' Liability Cases, 223 U. S. 1, 46.) It is as broad as can be imagined, with some possible express constitutional limits, as, for instance, protection against confiscation, unnecessary to be here considered, because not in any wise made an issue. Congress, so far as concerns the particular question now presented, is practically as supreme as would be Great Britain, Germany and France, or any kingdom, empire or republic of the world. The statement of Mr. Chief Justice Marshall (*Gibbons* v. *Ogden,* 9 Wheat. 1, 196), recently here (*Atlantic C. L. R. Co.* v. *Riverside Mills,* 219 U.

S. 186, 201) in express language reaffirmed, and thereafter in principle restated (Second Employers' Liability Cases, 223 U. S. 1, 46, 47), was this:

> "It is the power * * * vested in Congress as *absolutely* as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Mr. Justice Harlan (*Champion* v. *Ames*, 188 U. S. 321, 348), in speaking of *Gibbons* v. *Ogden*, 9 Wheat. 1, said:

> "The principles announced in *Gibbons* v. *Ogden* were reaffirmed in *Brown* v. *Maryland*, 12 Wheat. 419, 446. After expressing doubt whether any of the evils proceeding from the feebleness of the federal government contributed more to the establishing of the present constitutional system than the deep and general conviction that commerce ought to be regulated by Congress, Chief Justice Marshall, speaking for the court, said: 'It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states.' Considering the question as to the just extent of the power to regulate commerce with foreign nations and among the several states, the court reaffirmed the doctrine that the power was 'complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution.'"

In *Southern R. Co.* v. *U. S.*, 222 U. S. 20, 27, Mr. Justice Van Devanter said that the power

> "* * * to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it."

In fact, this power, "subject to no limitations save such as are prescribed in the Constitution," is so broad and so "complete in itself" (Second Employers' Liability Cases, 223 U. S. 1, 47) that the regulation "may properly take the form and have the effect of prohibition" (*Northern Securities Case,* 193 U. S. 197, 335), "the entire strength of the nation may be used to enforce in any part of the land the full and free exercise" thereof and, when exercised, "the strong arm of the national government may be put forth to brush away all obstructions" thereto, and even "the army of the nation and all its militia" called upon to enforce the regulation. (*In re Debs,* 158 U. S. 564, 582.)

(c) The conduct of commerce is transportation; *i. e.,* an *act.* (Second Employers' Liability Cases, 223 U. S. 1, 47.) The carrier which performs that act, and incidentally, the employees who, as instrumentalities, assist in its performance, must do so under such rules as Congress, "with appropriate regard for the welfare of" the men and the public, may see fit to prescribe. (*id.* 47.) Neither the judgment of the carrier nor that of any court can question (*McLean* v. *Arkansas,* 211 U. S. 539, 547; *C. B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 569; *McDermott* v. *Wis-*

*consin,* 228 U. S. 115, 128; *Erie R. Co.* v. *Williams,* 233 U. S. 685, 699) the congressional discretion in exercising that power, *"complete in itself"* "to the *utmost* extent of that act and *every* incident having substantial relation thereto." Second Employees' Liability Cases, 223 U. S. 1, 47.) *Anything,* deemed necessary, can be done to save commerce "from prevention or destruction" and "to make" it "more secure, more reliable or more efficient." (*id.* 48.)

A former learned solicitor general, whose language was here (*id.* 48) adopted, thus aptly summed up the situation:

> "Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expedi-

tious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

Mr. Justice Van Devanter (Second Employers' Liability Cases, 223 U. S. 1, 45, 46, 47) not only adopted that summary, but thus stated the existing law:

"1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land. 2. The phrase 'among the several states' marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single state and does not affect other states—the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the states severally. 3. 'To regulate,' in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large. 4. This power over commerce among the states, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried

on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce. 5. Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees. 6. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power."

Paraphrasing the foregoing language of the former Solicitor General, adopted by Mr. Justice Van Devanter as a doctrine of this court, and remembering that men, *actually moving the trains,* are but instruments of commerce, *i. e.,* parts of the very act, it is manifest that these instruments can be destroyed or their usefulness, as a whole, impaired by a refusal to pay some of them sufficiently for the service or to fairly measure their compensation. By such refusal, that *act* or *movement,* called commerce, can be interrupted—even stopped. A refusal to pay a just wage or adopt a fair measure therefor may not only interrupt but stop commerce. So unless a satisfactory wage

is paid, or measure prescribed, there may be difficulty in obtaining agents in sufficient numbers of the right kind or quality. Failure to pay fair wages or to fix a fair standard therefor, make slow, costly, unsafe or otherwise inefficient these agencies, which are actual parts of the *act* of commerce. If the amounts paid them be wrong and insufficient, then the conditions under which they work become wrong or disadvantageous. Such bad conditions may entirely prevent or partially interrupt commerce, or at least make it less expeditious, reliable, economical or secure. Therefore, Congress, in legislating about the conditions upon or under which those agents perform their work, must necessarily have the right not only to say what shall be the hours of service and the measure of compensation, but also, if desired, the amount in dollars which they shall be paid for those hours, measured according to a legislative standard. In line with these principles, it may be remarked that those hours of service, which the carriers in practice actually use as measures of compensation, have a direct relation to the safety of the employees as well as to the safety and the efficiency of service to the traveling and shipping public. So it was decided in *B. & O. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618, 619, where Mr. Justice Hughes thus said all that is necessary to sustain the legislation now in question:

> "The fundamental question here is whether a restriction upon the hours of labor of employees who are connected with the movement of trains in interstate transportation is com-

> prehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider and endeavor to reduce the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the Act. And in imposing restrictions, having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution."

The sweeping nature of this power of Congress was, in 1912, the subject of an investigation and an elaborate report of the Senate Judiciary Committee (Senate Report No. 553, 62 Congress, 2d Session, pp. 25-55), which report was approved and adopted by the House Committee. (House Report No. 1441, 62 Congress, 3d Session, pp. 25-55.) The document is worthy of perusal. It could well be adopted as a sufficient brief upon the question involved. This because of the painstaking care with which it was prepared, the legal ability of those responsible therefor, and the great learning evinced therein. This subject could now, in the light of these suggestions, be well left with

the thought, by Mr. Chief Justice, then Mr. Justice, White (First Employers' Liability Cases, 207 U. S. 463, 495), thus clearly expressed:

> "Take the case of an interstate railway train; that is, a train moving in interstate commerce, and the regulation of which therefore is, in the nature of things, a regulation of such commerce. It cannot be said that because a regulation adopted by Congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power, would be but to concede the power and then to deny it; or, at all events, to recognize the power and yet to render it incomplete."

(4) At the expense of repetition, it may be said that the validity of the law depends *solely* on the power to pass it (First Employers' Liability Cases, 207 U. S. 463, 491, 492), and in no wise upon possible evils or inconveniences, real or imaginary, which may arise in its application, nor upon any supposed mistaken legislative judgment as to policy (*McLean* v. *Arkansas*, 211 U. S. 539, 547; *C. B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 569; *McDermott* v. *Wisconsin*, 228 U. S. 115, 228); no existing contract or schedule can defeat its purpose (Second Employers' Liability

Cases, 223 U. S. 1, 52); every presumption must be indulged in its favor (First Employers' Liability Cases, 207 U. S. 463, 509, 510, 511; Legal Tender Cases, 12 Wall. 457, 531; Trade Mark Cases, 100 U. S. 96; *Nicol* v. *Ames,* 173 U. S. 514, 515); the governmental power to act is "subject to no limitation," is *"complete in itself,"* to regulate to the *"utmost* extent *every* part of * * * commerce" (Second Employers' Liability Cases, 223 U. S. 1, 46-47), and "to prescribe the rules under which * * * commerce may be conducted" (*Atlantic C. L. R. Co.* v. *Riverside Mills,* 219 U. S. 186, 201), including the right of "direct supervision, control and management" (*In re Debs,* 158 U. S. 564, 578) of all the instrumentalities thereof, of which the employees are an important and essential part. (First, 207 U. S. 463, and Second Employers' Liability Cases, 223 U. S. 1, 46, 47.) With these general principles in mind, the power exercised is as a regulation of commerce, fully justified by these considerations:

Since the employees, *moving the trains,* are but instrumentalities and parts and parcels of that *act* or *movement,* called commerce, it would seem to follow that even hours of service, considered simply as measures of compensation, fall within the governmental power "to prescribe rules" of conduct (*Atlantic C. L. R. Co.* v. *Riverside Mills,* 219 U. S. 186, 201) governing that "direct supervision, control and management" (*In re Debs,* 158 U. S. 564, 578) which Congress can assume and exercise. It is difficult to draw even an argumentative line between that right and the conceded power to *absolutely* fix the hours of service (*B.*

*& O. R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612), the amount to be paid men for pilotage (*Cooley* v. *Board of Wardens,* 12 How. 299; *Ex parte McNeil,* 13 Wall. 236) and quarantine (*Morgan's S. S. Co.* v. *Louisiana,* 118 U. S. 455) services, the time when seamen's wages shall be paid (*Patterson* v. *Bark Eudora,* 190 U. S. 169), the character of the safety appliances (*Johnson* v. *Southern Pacific R. Co.,* 196 U. S. 1) and headlights (*Atlantic C. L. R. Co.* v. *Georgia,* 234 U. S. 280) to be used, the number of the men who shall as a crew (*C. R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453) man a train, and the compensation to be paid for the death or injuries to employees. (First, 207 U. S. 463, and Second Employers' Liability Cases, 223 U. S. 1.) Even though the men themselves are just as much part and parcel of the *act* of transportation (*id.* 47) as cars and appliances are, and their hours of service are subject to regulation (*B. & O. R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612), and their compensation for injuries is a matter of congressional concern (Second Employers' Liability Cases, 223 U. S. 1), yet it is claimed that when the hours of service are coupled with bases, standards or measures of their compensation, some radical distinction is to be made because these have no "real or substantial connection with interstate commerce," wherefore Congress is helpless. This claim of the carriers is one, the futility of which has already been shown in a case (First Employers' Liability Cases, 207 U. S. 463, 495) where Mr. Chief Justice (then Mr. Justice) White justly observed (*id.*) that such con-

tention conceded the power and yet denied its existence, recognized it and yet rendered it incomplete.

But as to this view it appears plain:

(a) A carrier engaged in interstate transportation (*Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, 292, 293) is "in the exercise of a sort of *public* office, and has *public* duties to perform," and is authorized "primarily for the convenience of the people and to subserve *public* ends, and, therefore, subject to governmental control and regulation." The main duty of carriers is to carry. This is "the *ultima* ratio of their existence" (*id*). They must therefore put themselves in a position to carry promptly and with efficiency. (*People* v. *New York Central & Hudson River Railroad Company*, 28 Hun. 543, 553; *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, 292.) The duty is absolute. Increased expense is no excuse, for as (*People* v. *New York, etc., Co.*, 28 Hun. 453) said:

> "The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally expressed consent of the state."

Or as once (*Loader* v. *Brooklyn Heights Co.*, 14 Misc. Rep. N. Y. 208, 35 N. Y. Supp. 996) plainly put:

> "If they cannot get labor to perform such duties at what they offer to pay, then they must pay more and as much as necessary to get it."

In *Smyth* v. *Ames*, 169 U. S. 466, 526, it was, of this distinction, remarked:

> "This is so because, as the primal duty of a carrier is to furnish adequate facilities to the public, *that duty may well be compelled*, although by doing so, as an incident some pecuniary loss from rendering such service may result."

This language was quoted with approval and the principle enlarged upon and enforced in *Missouri Pacific Railway Co.* v. *Kansas*, 216 U. S. 262, 278. It finds direct support in *Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 529, and Beale & Wyman on Railroad Rate Regulation, 1st Ed., section 274. The duty to serve the public by keeping cars moving is one which the Government can enforce, as has been thus plainly (*People* v. *N. Y., etc., Co.*, 28 Hun. 543) shown:

> "These facts reduce the question to this: Can railroad corporations refuse or neglect to perform their public duties upon controversy with their employees over the cost or expense of doing them? * * * The respondents had a lawful right to take their ground in respect to the price to be paid, and adhere to it if they chose; but if the consequence of doing so was inability to exercise corporate functions to the great injury of the public, they cannot be heard to assert that such consequence must be shouldered and borne by an innocent public, who neither directly nor indirectly participated in their cause."

Full support of this principle is found elsewhere. (*Blackstock* v. *New York & Erie R. R. Co.,* 20 N. Y. 48; *Pittsburg, etc., Ry. Co.* v. *Hazen,* 84 Illinois 36; *Central Railroad & Banking Co.* v. *Georgia Fruit Exchange,* 91 Ga. 389; *Loader* v. *Brooklyn Heights Ry. Co.,* 35 N. Y. Supp. 996; *Missouri Pacific Railroad Co.* v. *Kansas,* 216 U. S. 262.)

To move cars, as the carriers to conduct commerce must, it takes men. If they work, their compensation must be first measured and then paid. How well and certainly the duty is performed depends upon their contentment, ability, health, hours of service, and the measure and the amount of their compensation. These things are directly connected with those movements of cars which the public can demand, and the carriers, through the service of their men, *must* make. This service, the hours devoted thereto and the measure and amount of compensation, all necessarily bear *some* real relation to the men who, as part of the *act* of commerce, are to do the work and to be paid therefor. If this be not true, then the expression "real or substantial relation," so often used here, will become a snare and delusion, instead of a reality, and stand as mere words without meaning. If the carrier fails to perform its duty by obtaining men to render the service, the Government can, in the public interest, see that it is done. It can, if necessary, hire the men, or even take possession of the cars and move them. If through some niggardly or mistaken policy the carrier fails to perform its duty by refusing to pay for the real value of the service, or fix a fair

measure of compensation therefor, the *public* duty to put the cars in motion does not cease. There is a government which can conduct the business, *i. e.*, commerce, for of that there is the right of "*direct* supervision, control and management." (*In re Debs*, 158 U. S. 564, 578.) That government, instead of itself actually so taking charge, may require the carrier to see to it that the movement is made by *right* men, employed on *right* schedules, at *right* prices, as it may determine them to be. However, from that which has already been here said, it is apparent that the only thing necessary to be decided is, that the *measure*, not necessarily the amount, of the employees' compensation bears *some real* relation to them, as men; especially to those of them with whom the Act deals, *i. e.*, those *actually* engaged in transportation, the act and movement of which constitute commerce.

(b) The affirmative duty of the Government exists to see, *after* a strike occurs, that the carrier performs its public duty, for, as here (*In re Debs*, 158 U. S. 564, 586) once remarked:

> "The National Government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping these highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of the Government to remove obstructions from the highways under its control."

As to accomplishing this (*id.* 582), it was also then said:

> "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and its security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."

Yet by the carriers' narrow logic, this power to be exercised *after* a strike is on, cannot be called upon *before* to prevent that strike from occurring.

This power to quell a strike may be likened to the promotion of commerce by either removing or providing against other possible obstructions. This can be done against a sovereign state (*Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1) as well as against an aggregation of carriers or individuals, for, as Mr. Justice Brewer (*In re Debs*, 158 U. S. 564, 586) said:

> "If a state with its recognized powers of sovereignty is impotent to restrict interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?"

In removing or providing against obstructions to commerce, the nature of the interference is im-

material. Thus state laws may be nullified (*McDermott* v. *Wisconsin*, 228 U. S. 115), obstructing bridges or piers removed (*Ex parte McNeill*, 13 Wall. 236, 240; *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251), agreements restraining trade forbidden (*Northern Securities Case*, 193 U. S. 197), boycotts declared illegal (*Loew* v. *Lawler*, 208 U. S. 274), employers' liability regulated (*Second Employers' Liability Cases*, 223 U. S. 1), full crews (*Chicago, R. I. & P. R. Co.* v. *Arkansas*, 219 U. S. 453), electric headlights (*Atlantic C. L. R. Co.* v. *Georgia*, 234 U. S. 280) and safety appliances (*Johnson* v. *Southern Pacific R. Co.*, 196 U. S. 1) required and strikes put down (*In re Debs*, 158 U. S. 564). Disputes about wages sometimes result in strikes. These may, and frequently do stop or interfere with that free flow of commerce which Congress has power to keep moving. They are the usual weapons with which labor enforces its demands. Carriers, in anticipation thereof, interrupt commerce by refusing to receive certain classes of freight. These strikes, if in existence, or only threatened, seriously affect the channels of commerce and often block them. They are, after all, whether in actual existence or only threatened, *obstructions* which, in whatever form they appear, things which the Government can prevent or remove. Being but obstructions, it is just as necessary to control and safeguard against them by settling wage controversies as it is to remove any other kind of an obstruction. Such is the result of the dissents in *Adair* v. *U. S.*, 208 U. S. 161, by Mr. Justice McKenna (*id.* 180-190) and Mr. Justice Holmes

(*id.* 191-192) dealing with that very question. There (*id.* 189, 190) Mr. Justice McKenna said:

> "A provision of law which will prevent, or tend to prevent, the stoppage of every wheel in every car of an entire railroad system, certainly has as direct influence on interstate commerce as the way in which one car may be coupled to another, or the rule of liability for personal injuries to an employee. * * * I would not be misunderstood. I grant that there are rights which can have no material measure. There are rights which, when exercised in a private business, may not be disturbed or limited. With them we are not concerned. We are dealing with rights exercised in a *quasi public* business, and therefore subject to control in the interest of the *public.*"

There (*id.* 191, 192) also, Mr. Justice Holmes said:

> "I confess that I think that the right to make contracts at will that has been derived from the word 'liberty' in the Amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of *public* policy for restraint, the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along."

The latter also recently remarked, in a case (*Coppage* v. *Kansas,* 236 U. S. 1, 27), in which the dissent of Mr. Justice Day (*id.* 27, 42) concurred in (*id.* 42) by Mr. Justice Hughes led to the same result, that even "*Adair* v. *United States,* 208 U. S. 161 * * * should be overruled."

This power to prevent or remove obstructions is simply seeing to it that commerce is unobstructed and trains are run. Under its exercise, strikes, if threatened, can be prevented, or if called, put down. This implies the power to obtain and use the facilities necessary for the purpose. Good equipment and a sufficient number of competent men can be required or obtained. Yet to obtain these, wages must be paid. The men must work alertly, willingly, contentedly and with ability; otherwise they are of little value; to obtain men who will work efficiently, calls for some satisfactory method of measuring their compensation. The carrier, by its refusal to adopt some reasonable measure, cannot itself be the cause of either a threatened or an actual *obstruction* which Congress cannot prevent or remove. The carrier cannot play the "dog in the manger," refuse to satisfactorily measure the compensation of the men and then defy the Government in the exercise of its right to prevent or remove the obstruction. The hours of service are important to the efficiency of the men. No less is the measure of their compensation. These men are human beings; they have family ties; they are entitled to time and rest at their homes. The more contented the servant, the better service. In all

this, the public has an interest. Hours of service, the measure of compensation, the wages actually paid, all necessarily bear a real and substantial relation to the right to prevent and remove all obstructions to the movement of trains, whether caused or likely to be caused by a strike or otherwise. The entire ability to prevent or remove an obstruction in the form of a strike, may depend upon the measure of compensation or the amount of wages paid the men called upon to render the service. The strike may be prevented, or, as an existing obstruction, removed by fixing a measure of compensation or a fair wage for the men *actually engaged in the movement of the trains,* or to others who supplant them. How, then, can anyone say that this bears neither real nor substantial relation to commerce, one phase of which is the actual, constant, uninterrupted movement of the cars?

(c) But when the men are hired, whether to prevent or remove obstructions or merely to conduct transportation, their safety, health, contentment and efficiency are so really and substantially connected with commerce as to justify the establishment of shorter hours as a day's work. So far as concerns their health, safety and efficiency, this doctrine has been fully recognized as applicable to these hours of service (*B. & O. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612), which, in the conduct of business, are actually used to measure compensation. The *public* interest in the safety, health, contentment, competency and general efficiency of the men is such, that the same reasons,

which justify the establishment of the hours of service, make the bases, measures and standards of compensation necessarily bear a *real* and substantial relation to transportation.

The health, safety and convenience of the employee, from his own standpoint, is not all there is to be considered. The public is entitled to service and all that term implies. Convenience in and comforts of travel, and certainty in making connections or reaching destinations, and safety to the travelers, to the commodities which are shipped, and to those at or near the tracks, are demanded. Rapid transit is called for. All that exists in efficiency must be provided. Service of the highest class is that which is required. Certainty of performance is no small part of the duty owed. To obtain all this, it is necessary to have men alert, contented and willing in the performance of a dangerous occupation. Shorter hours make for efficiency and competency. The better the servant, the greater his compensation. The measure of this compensation and even the rate of wages are so closely connected with the performance of these public duties, that regulation is necessary. The public is entitled to protection against that inconvenient, inefficient, delayed and unsafe method of transportation which may result from unsatisfactory wages or cheap help. Satisfied minds (*Watson* v. *St. L. I. M. & S. R. Co.*, 169 Fed. Rep. 942, 950) and health, unexhausted bodies, make for efficiency and certainty in the performance of duty. Good mental, as well as physical, condition is necessary. Capable employees are as important as proper mechanical

instrumentalities. To obtain them, it is necessary to employ them, fix their hours of service and measure their compensation and pay their wages. All these things bear a real relation to these men who themselves are part and parcel of the act, called commerce.

(d) Congress, by virtue of its power to regulate, can fix rates. (*C. R. I. & P. R. Co.* v. *Interstate Commerce Commission,* 218 U. S. 88; *Smyth* v. *Ames,* 160 U. S. 466; *Willcox* v. *Cons. Gas Co.,* 212 U. S. 19; Minnesota Rate Cases, 230 U. S. 352; Missouri Rate Cases, 230 U. S. 509.) In the exercise of this power, these are the governing principles: The service rendered is public. It is one which the government can itself render or have performed through *quasi-public* agencies. These agencies in performing the service, act for the public, and in its interest. The permission so to act may be upon the conditions set forth in a contractual franchise, or by its equivalent, mere acquiescence of the controlling power. Whichever way is adopted, the *public* function is being performed, though the agents' property is used in that performance. No less an authority than Mr. R. S. Lovett (Senate Document 549, p. 73), an official spokesman of the carriers, tells us that the carriers "are mere agents for the *public* in conducting the transportation business of the country." That to which the agent is entitled is reasonable compensation for the use of his property. This comes from the gross income after deducting expenses, and is to be ascertained in this way: The value of the property used is fixed. Upon that must be paid

a reasonable rate of interest. If, after deducting from the income the expense of the business, the net result is more than enough to pay that interest, the rate should be reduced; if not sufficient so to do, it must be increased. This is the rate making power and comes as a regulation of commerce. At its very foundation lies the problem of deduction of expenses from earnings, for that which is dealt with is the *net,* not the gross income. To the *net,* the interest and eyes of the public turn. Every item of these expenses must be reasonable. For each one there must be a measure or method of ascertainment. In each, the public has an interest. Congress and its administrative agencies have something to say about what is or is not reasonable, whether a cheap or high class of servants shall be used, whether one is paid too much, the other too little; whether skilled or unskilled men shall be employed. This means there is the power to measure, equalize, and even fix, wages and salaries, whether they be of officers or employees. This is necessary, so as to see that there is neither injustice nor inequality nor any unreasonable charges made. There is power to say one class of equipment, appliances or men is not sufficient, even at the expense of the carrier in paying more for another. Why not, then, say what class of men shall be employed, for how long and what shall be the measure of their compensation. If there be anything about this matter of expense in which the public has any direct interest, then it must surely bear something more than a remote and indirect relation to the *act* of commerce, of

which the employee is a part. All that is needed to say is that the subject bears "a real or substantial connection" with those men, who are part and parcel of the act of commerce. If the way to measure the compensation of those employees, who are *actually* engaged in *moving* trains, does not bear such a connection, it is hard to conceive of anything which does.

## IV.

### Alleged Non-Workability of the Act.

(1) The carriers, theoretically and without a test, *now* abandoning the position assumed in conference with the president, the basis of their proposition for adjustment, and their contentions before the Senate Committee, say that even if there was power to pass the act, its provisions are such that it is for some reasonable, unworkable, because in practice, its exact words, incapable of expansion or contraction, though strictly applicable to terminal service, cannot be *literally* applied to *all* existing train movements. This disregards the spirit, and makes construction rest entirely upon the letter of the act. Taking as a premise only the *words* used, the argument is: There was fixed, inflexibly, eight hours, no more, no less, as a day's service for *all* employees, both passenger and freight, engaged in operating interstate railroad trains; such restriction is practically impossible in actual long distance train service, because trains must reach their destination and not be left standing between stations; to enforce the *letter* of the Act, exactly as written, divisional

points must not be more than eight hours apart; passenger crews now operate trains upon a basis of four or five hours, as a day's work, or run one hundred miles or less at a rate of speed of twenty-five or thirty miles an hour; to readjust the work of *these* men on an eight-hour basis, would be destructive of service, efficiency and public convenience; in these circumstances, to decree an eight-hour work-day, with no dispensing power, would require such impractical readjustments of railway divisions, train schedules, running time and connections as to destroy train service and disrupt the entire transportation problem.

(2) The whole point of the carriers' contention is made to rest upon the thought that eight hours shall, for *all* employees, arbitrarily constitute a day's work; this, whether they were in contemplation by the legislative mind or of the class to whom Congress was giving protection; so, too, though Congress was, over the protest of the carriers, professedly *increasing* the pay of employees, it is sought to apply the language to all *decreases* made necessary by the *words* of the Act.

But as the Scripture puts it—"the letter killeth —the spirit maketh alive."

It was, by Plowden (p. 467) most beautifully said:

> "And so there are an infinite number of cases in our law which are in equal degree with others provided for by statutes, and are taken by equity within the meaning of these statutes. And from hence it appears that there is great diversity between these two

> equities—the one abridges the letter, the other enlarges it, the one diminishes it, the other amplifies it, the one takes from the letter, the other adds to it. So that a man ought not to rest upon the letter only, but he ought to rely upon the sense, which is tempered and guided by equity, and therein he reaps the fruit of the law, for, as a nut consists of a shell and a kernel, so every statute consists of the letter and the sense; and as the kernel is the fruit of the nut, so the sense is the fruit of the statute."

*Holy Trinity Church* v. *U. S.*, 143 U. S. 457, says all upon this subject that is necessary. An alien was imported to serve as rector of a church, and this was within the letter of the statute, which forbade the importation of any alien "to perform labor or service of *any* kind in the United States. * * *" Conceding that the letter of the statute covered the case, it was held that its spirit did not, and to ascertain this spirit, access, through judicial notice, was had to the journals of Congress and they were viewed in the light of current history. Mr. Justice Brewer, among other things, said:

> "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surround-

ing its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

He approvingly referred to *State* v. *Clark,* 29 N. J. L. 96, 99, where it was said:

"To adopt such a construction would put a stop to the ordinary business of life. The language of the Act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the Act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the Act must limit and control the literal import of the terms and phrases employed."

In *United States* v. *Kirby,* 7 Wall. 482, 486, it was said:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the Legisture intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

In *U. S.* v. *Palmer,* 3 Wheat. 610, 631, Mr. Chief Justice Marshall said:

"The words of the section are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But general words must

not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them."

The principle of *Holy Trinity Church* v. *U. S.*, 143 U. S. 457, was recently pointedly applied by one of the great state judges (*Perry* v. *Strawbridge*, 209 Mo. 621, 636-645) and has often been expressly approved and applied to matters within the letter, but without the spirit of the statute, as a reference to other cases (*U. S.* v. *Laws*, 163 U. S. 258; *U. S.* v. *Bashaw*, I. C. C. A. 653, 50 Fed. Rep. 749, 755; *Davis* v. *Bohle*, 34 C. C. A. 372, 92 Fed. Rep. 325, 328; *U. S.* v. *Gay*, 37 C. C. A. 46, 95 Fed. Rep. 226), clearly shows.

(3) The question of unworkability is, purely and simply, an afterthought upon which the carriers should not be permitted to be heard. It rests upon no solid ground, as clearly appears from the history of the legislation and the subsequent litigation. The contention rests entirely upon an assumed false premise and it would be a foolish lawyer who would permit (as we shall not) his opponent to state his case for him. As a matter of fact, the meaning of the Act, when read in the light of the methods of doing business, railroad language and contemporaneous history, is not to be determined by its letter, but wholly by its sense. It practically affects, and was only intended to affect, the freight and terminal service, not that of the passenger trains where they were being run on schedules of less

than eight hours a day. It was intended to substitute in the schedules an eight for an *existing* ten-hour (or more than eight) standard—not to *increase* a four, five or six-hour service to eight. It was intended to fix a basic hour and day service which would *decrease,* not increase, the number of hours then used as a standard.

(4) The issue which brought about the passage of the Act was never for that which the carriers now claim it means. No one who took any part in any of the things which led up to its passage ever had any such idea. This plainly appears for these reasons:

Hours of service have not only been heretofore recognized by Congress (*B. & O. R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612), but have frequently been fixed by state legislation, not only in private business, but also in railway and street railway work (see compilation in brief for defendant in error, in *Bunting* v. *Oregon,* Vol. I, pp. 2-10, now here under advisement), yet no one ever anywhere before contended that such provisions were not workable.

(a) As already stated, each carrier and all its employees have, for years, worked under schedules agreed to by it and union labor organizations. These schedules were worked out after years of contest—concessions having been wrung, sometimes by arduous negotiations, sometimes by patriotic mediation, or often by bitter arbitration. (President's Message, Rec. 18-23, Senate Document 549, 64 Congress, 1st Session; statements of A. B. Garrettson, *id.* 24-42; Samuel Gompers, *id.* 62-69, and W. G. Lee, *id.* 62-69.) The sched-

ules are all of the same general character, differing only as to details, wholly dependent upon local conditions. Those of the appellees appear as Exhibits 1 and 2 to the bill (Rec. 23, 38). They speak for themselves and are representative. Similar schedules on other lines are presented for *illustration in argument only* (Stipulation, par. 2). This so that not only the entire railroad situation may be understood, but that it may be readily seen that the outcry of the carriers against the enforcement of the Act is for public consumption, rather than to show any inability to apply its terms to existing conditions. These schedules, with the hours of service occasionally changed, and additional privileges from time to time granted, have been in force for years.

(b) In June, 1916, dissatisfaction had arisen. The unions, after much discussion with the carriers, demanded in writing (Exhibit "A," Rec. 17) a modification thereof so as to practically make in the freight service, eight or less, instead of ten hours or less, the standard of a day's work, the requirement of extra hours to be penalized (*State* v. *Bunting,* 71 Ore. 259, 139 Pac. Rep. 731, 736; statements A. B. Garretson Senate Document 549, p. 31; W. G. Lee, *id.* p. 63) by payment therefor on the basis of one and one-half times regular pay. Eight or ten hours or less, as the bill (Rec. 10, 12, 13, 14) avers, and the representatives of the carriers said (Senate Document 549, p. 154), was the equivalent of one hundred miles or less, run at the rate of twelve and one-half or ten miles an hour. The demand (Bill, Rec. 6) thus made

related to all road and terminal service, except that of moving passenger trains, where the men were working on a basis of *less* than eight hours a day. The *express* condition of that demand was that the men should not receive *less* for eight hours or one hundred miles "than they *now* receive." The demand was for the fixing of a number of hours beyond which the carriers should not go. (Statement A. B. Garretson, Senate Document 549, p. 31.) Eight hours or less was also to be the measure in terminal service, such as switching, yard and hostler's service, where it was difficult to also measure in that equivalent called mileage, but not even now troublesome to carriers to measure by hours. As written, the demand bore no relation to the passenger train service, as that was in practice performed.

(c) To the demand of the unions, the carriers made some kind of counter proposition, the nature of which was omitted from the bill. No reason for the omission appears. It was included in their *written* demand (Senate Document 549, 64 Congress, 1st Session, pp. 41-42) for arbitration and a few words would have supplied the omission. But this demand was not, as from the bill, the casual reader might be led to believe, only as to the hours of service and its equivalent in miles. It was *also* for arbitration of those detailed provisions in schedules giving the men, regardless of hours, certain privileges—concessions theretofore obtained, but only after years of contest. This *additional* broad demand of the carriers, disconnected as it was from the hours of service, was, apparently, so unreasonable that it

is doubtful if it could have met the approving judgment of any fair-minded man. The President, in rejecting the unfair suggestion, said (Message Rec. 19) that the demand therefor included a revision of the schedules in respect to privileges accorded the men which had been "worked out through *many years of contest.*" Of these privileges, theretofore granted, and then sought to be questioned, a spokesman of the unions (Senate Document 549, p. 30) well said:

> "There are a series of allowances that through the years have been built up by those men who are required to give more than the equivalent of a day's labor for a day's wage, that they shall be paid arbitrarily for that service certain allowances an hour for this and an hour for that. These proposals embrace all of those things that the men have enjoyed for years and which were granted to them as a question of equity."

The unions' demand and the carriers' unreasonably broad and unfair request for an arbitration of matters disconnected from the unions' request, brought on a call for a general strike, to be put in force September 4, 1916. Had it not been called off, it would have paralyzed traffic, prevented the conduct of interstate railroad business, and unduly disturbed the peace and prosperity of the country. The President's message (Exhibit "B," Rec. 18) called upon Congress for legislative action, succinctly stating that the denied demand of the unions was "for an eight-hour day" for "employees in *freight* train service," hours of service which the spirit of the times fav-

ored, and that four hundred thousand men had voted to strike on September 4, 1916, if the demand was refused. He proposed "that the eight-hour day be adopted by the railway managers and put into practice as a *substitute* for the *existing* ten hour basis of pay service," and that in the meantime, a test be had. This language is incapable of misunderstanding. It could not have been used as to the passenger service, as then being conducted, because there was none such except upon a much lower standard of hours; it did not affect the existing standard on the thirty-two thousand miles where eight hours a day was already the standard; it did, however, reduce that standard to eight hours wherever it was then in excess thereof.

(d) The Act was then introduced in Congress and an extended hearing had before the Senate Committee (Senate Document 549, 64 Congress, 1st Session), where the strong men of both carriers and unions were fully heard. *Every* line of the proceedings of that committee and *every* word of *every* speaker shows to be true that which was said by the unions in their proposition (Exhibit "A," Rec. 17) and the President in his message (Exhibit "B," Rec. 18), *i. e.*, the evil to be remedied was not in the passenger service of a four, five or six-hour day, or its equivalent of one hundred miles or less, at twenty-five, twenty or sixteen and two-thirds miles per hour, but the *substitution* of the eight for the *existing* ten-hour standard in the other service. In other words, the purpose was not to *increase* the hours of service up to eight, but to *decrease* all above that

figure down thereto. The objection of the carriers was to the *decrease,* not to any possible *increase.*

The Chairman of the Committee (Senate Document 549, pp. 22, 23) opened the meeting with the remark:

> "The purpose of this hearing is to consider the measures which have been recommended by the President as necessary to meet the emergencies of a threatened strike and tie-up of the railroads. *These measures cover the eight-hour standard work day without diminution of the present ten-hour pay;* the creation of a wage commission to inquire into the *increased* cost of this change to the carriers, and the submission of the report of the wage commission to the Interstate Commerce Commission for its consideration and determination as to whether and *to what extent the facts necessitate an increase of rates."*

Later, there was this colloquy (*id.* 31) between the Chairman and Mr. Garretson, president of the Brotherhood of Railway Conductors:

> "The Chairman: What do you mean by 'minimum day'?
>
> Mr. Garretson: Mr. Chairman, our contracts all read—or virtually all—100 miles or less, 10 hours or less constituting a day. Bear in mind at the terminal we will have 50 crews. They run first in and first out. We are pieceworkers. There is no guaranty. If we work one day a month we get one day's pay. It is necessary to protect the ability of the man to earn in dull times by making a rule that they run first in and first

out in regular turn. The first man in is the first man out. If that man was called out for a 5-mile run and was only paid for 5 miles, he would stand behind 50 crews and might not be again called for a full day of 24 hours for three days. So in self defense, if that man moves at all, if he runs 100 miles or less, in 1 hour he has earned a day and goes behind all other crews. If he runs 1 mile in 10 hours he is given the equivalent of a day's wage."

Again, this took place (*id.* 37) between Senator Cummins and Mr. Garretson:

"Senator Cummins: I desire to ask just one question. You stated that in accepting the proposition of the President you gave up one-half of the demands that you had made upon the railway companies. Will you state what the demands were that you surrendered in accepting the proposal of the President?

Mr. Garretson: I shall be very glad to do so. You will bear in mind that that estimate is exactly in line with the estimate of the conference committee of managers itself, because their original statement was that our demands would cost them 100 millions, and yet after the acceptance of the present demands became public they dropped their estimate to 50 millions per year. Bear in mind that I am not giving the seal of commendation or approval to these figures but the two sums are found to be exactly on the same basis, and arrived at by the same method of computation which exists in this Form 35, which I referred to earlier. While it has much language, when you strip

it of the various provisions there is only one basic proposition in it, and that is the demand for the eight-hour day for the men represented by the brotherhoods, and to make that effective and to render it uneconomic to work men on long hours we demanded time and a half for every hour of work in excess of the time required to complete a trip at an average speed of 12½ miles per hour. Bear in mind that to us mileage and hours are interchangeable. Therefore, while they now pay pro rata overtime there is no incentive to shorten the hours if they can make money by using us on long hours. It is a penalty clause which makes the eight-hour day a thing that is worth while to observe. The charge that has been made by the other side that it was impossible to put in a true eight-hour day on a railway is correct. It can not be done for the simple reason that a workman in the ordinary pursuit follows his occupation virtually at the door of his home, where he has all the privileges of his home, whatever they may be, available to him. The trainman can not stop, because eight hours may find him in a semi-desert country, or find him 50 miles from his home; therefore he is compelled to go on and work, but he demands a higher rate of speed. He now works 10 miles an hour. He would then work 12½, and if he is run beyond that speed he wants to penalize the company until they will control, so far as they may, the speed of his train and get him in on time and not pay overtime."

The President's proposal for a settlement is reported (*id.* 41) as requiring a "concession of *the* eight-hour day," *i. e.*, the eight for the exist-

ing ten hours, which the carriers answered (*id.* 41) with the statement that "the railroads will, effective September 1, 1916, keep the time of all men represented in this movement, upon an eight-hour basis * * * the Interstate Commerce Comission to supervise the keeping of these accounts and report the *increased* cost of the eight-hour basis." Unless this reference was to the difference between the existing ten-hour day and the eight hours recommended by the President, there could have been no such increase. If the passenger hour day was that which was referred to, there would have been no increase, but a decrease in expense.

Samuel Gompers (*id.* 57) President of the American Federation of Labor, said:

> "A few weeks ago I had occasion to be in Detroit and there I went through the plant of Mr. Ford's automobile factory; I had every facility to obse-ve; the manager accompanied me. I asked him what the result had been of the operation of eight hours a day in his establishment. He told me this, which he has since written me, and I have incorporated what he said in the September issue of the American Federationist. He said, 'As compared with the operation of the plant under the ten-hour workday and now since the introduction of the eight-hour workday, the productive activity of the groups of men with similar tools, similar groups performing similar work, has increased fully 63 per cent.' You may consult any economist: consult any large employer of labor who has had the eight-hour day in operation for a series of years, and you will find like testimony."

Mr. W. G. Lee, President of the Brotherhood of Railroad Trainmen (*id.* 63), said:

> "We declined to arbitrate the question of the eight-hour working-day, because on many of the Southern roads and in the Southwest we have had in effect for years what is termed the eight-hour day, a road basis of 12½ miles per hour in through-freight service, or even better in some instances; and we did not propose to arbitrate something that we had enjoyed for years and that we had paid for. Never for a moment was there an offer made to us by the railroad companies that they would give us either the eight-hour day, the 12½-mile basis in *freight service,* nor an offer that they would give to us time and a half overtime, and as has been so well stated, the eight-hour day, as we considered it, is practically useless so far as shorter hours is concerned unless the company is *penalized* in some way for working men after the expiration of eight hours, or the expiration of the time necessary to form the basic day by dividing the day by the mileage, 12½ miles *instead of 10 miles, as at present.*"

Mr. R. S. Lovett, for the carriers (*id.* 73-74), said:

> "That brings us to some consideration of the eight-hour day. I shall not undertake myself to go into all the technique of that term. I am not sure that I understand it. I shall be very glad to read, as I fancy Senator Brandegee will read in the record, the answer of Mr. Lee to his question as to whether this was really an eight-hour workday or merely an effort to get an increase of pay.

I never heard the answer—was not able to catch it. It may have been given, but, if so, it was too technical for me to grasp. *I understand that if it were proposed by Congress to forbid these men from working more than eight hours a day, they would be up in arms against it. What they really want is an increase in pay. That is the real issue.* What is meant by a basic eight-hour day, and the question of the relation of miles to time, I shall not undertake to explain. Mr. Elisha Lee (assistant general manager Pennsylvania railroad and chairman of the conference committee of railroad managers) or some other transportation man can explain it better than I."

Senator Thompson (*id.* 78) said:

"I understand the employees want simply the right to make the run in eight hours instead of ten, as now required."

Mr. Lovett (*id.* 78) said:

"As each trainman gets into the terminal he has his choice of 100 miles or ten hours. If he gets in within ten hours, he takes the 100 miles, because it pays him better. If he takes longer than ten hours, he will take the miles. Now, as the trainman gets in, he sends in a statement indicating his choice—the time slip. These men have taken the actual time slips for a month—October, I think—and figured them on the eight-hour basis and the ten-hour basis, and found the difference."

Mr. Elisha Lee (*id.* 83) said:

> "In considering the pending bill it should be borne in mind that the existing wage schedules of the railroads are on a dual basis —100 miles or less constituting a day, with provisions for overtime after a period produced by dividing the miles per run by the basis of speed prescribed. That is, if you have 100 miles, you divide that by ten miles an hour and you get ten hours as the basis. If you have 120 miles, on a ten-mile-an-hour basis, you divide 120 by ten, which gives twelve hours before overtime begins."

Again (*id.* 84):

> "Changing the speed basis from ten to 12½ miles per hour, or changing the minimum guarantee from ten hours to eight hours per day, would result in an increase of 25 per cent in the hourly rate of wages. That is very evident, because if you have a conductor making $4 for ten hours and you pay him $4 for eight hours you increase his hourly rate from 40 cents to 50."

Again (*id.* 86):

> "These are examples which were taken from the minutes of a meeting that we had in New York, and were some of the examples that were presented by the organizations at that time, when they asked us what we would do with them under our proposition. They merely show what is in the schedules at the present time, and what would be accentuated in many instances *if the ten-hour day was reduced to eight hours.*"

Again (*id.* 87):

> "Senator Brandegee: Let me ask you this question. I assume in your existing agreements with your operatives the basic day is the ten-hour day?
>
> Mr. Lee: That is the prevailing one; yes, sir.
>
> Senator Brandegee: Now, if this bill should pass, making the basic day eight hours *instead of ten hours,* would the operatives work any fewer hours a day?
>
> Mr. Lee: Quoting from my namesake on the other side, looking at it from a dollars and cents standpoint, I do not think he would. That is the conclusion we reached."

Senator Brandegee and Mr. Sheean, for the carriers (*id.* 97-98), engaged in this colloquy:

> "Senator Brandegee: Mr. Sheean, let me ask you this: "You appear to be familiar with this business. This bill on the first line of the first page proposes to make these provisions apply to the passenger as well as to the freight traffic. There has been nothing said about the passenger traffic. What effect would it have on it if this bill were passed; what is the necessity for applying it to the passenger traffic? Are there more than eight-hour runs in the passenger service of the country?"
>
> Mr. Sheean: No, the longest that I know of—that is on the basis of pay; there are some that are longer in time; some of those long local or accommodation trains that they have in the Far West—but the speed basis. 6 hours and 40 minutes of the Western award, I think, is the lowest speed basis.

Mr. Garretson: There is no through traffic that is affected by it.

Mr. Sheean: There is no through traffic that is affected by it. The Senator was asking about the word 'persons,' on line 10. I suggested last evening that I thought by the time your eagle eye had gone over this that the word 'persons' would be taken out of it.

Mr. Garretson: I had my eagle eye on it, but I did not see very well."

In a colloquy (*id.* 99) between the Chairman and Mr. Elisha Lee, this appears:

"The Chairman: I will ask, Mr. Lee, if you have made any estimates of the effect of the wage cost of the roads the estimates of the basic eight-hour day with reference to all employees of the roads would have?

Mr. Elisha Lee: Do you mean if all the employees of the roads were put on an eight-hour basis?

The Chairman: Yes.

Mr. Elisha Lee: I have not made a study of that, Senator.

Senator Brandegee: Let me ask you this question: This bill or this proposal purports to apply this basic day for the purpose of reckoning compensation for service to those actually engaged in the work of operating trains and transportation business or property of the railroads. Does your estimate include yardmen and switchmen?

Mr. Elisha Lee: Yes, sir; *not passenger. Everything but passenger service.* The passenger service is not included in our estimates. I am not clear in my own mind whether that means passengers or not, but our estimates did not include passengers."

Mr. Thom for the carriers (*id.* 102) said:

> "But this proposition was not for that kind of an eight-hour day. There was a corollary attached to it, and that corollary was that there should be 10 hours' pay for 8 hours' work; that there should be ten-tenths of pay and eight-tenths of work."

Again (*id.* 105):

> "Senator Pomerene: It was suggested here in one of the arguments made today that a certain portion of these roads could afford to pay this *increase* and certain others could not. Have you investigated that subject sufficiently to be able to tell us what portion of these roads could afford to pay this *increase* and certain others could not? Have you investigated that subject sufficiently to be able to tell us what portion could and what could not?
>
> Mr. Thom: No, sir, I have been on the outskirts of this whole business. I do not know."

(e) After favorable committee report, the matter came before Congress (Congressional Record, 64 Congress, 1st Session, pp. 15611-16275), where consideration was given to the entire subject. All that was done and said only emphasized that which the unions asked (Exhibit "A," Rec. 17), the President recommended (Message, Rec. 18), and the participants in the committee hearing (Senate Document 549) understood, *i. e.*, the purpose was to *decrease* the railway working hours, as then in existence, from ten or more than eight hours, down to an eight-hour basis; there was neither thought nor inten-

tion of increasing it from less than eight hours *up* to that figure. It is manifest from that which has been said that the Act requires the carrier to fix as the basis of a work-day, no more than eight hours—leaving the parties to a lesser number if they had theretofore so contracted, or hereafter so contract. The eight-hour work-day, so fixed, is that which is known in the railroad world and was familiarly known to the framer of the bill (Rec. 1) and to counsel of *all* the carriers, (Alfred P. Thom, Senate Document 549, p. 154) as "the equivalent" of "one hundred miles or less at twelve and one-half miles per hour."

(5) Is then, the Act, as thus construed, workable? The carriers, in view of their past acts and declarations, should, as already suggested, be estopped to now claim to the contrary. The slightest review of the situation so shows.

(a) After the conference with the President, they (Senate Document 549, p. 41) made this proposition to be transmitted to the unions:

> "We propose as a basis of settlement the following:
>
> (a) The railroads will, effective September 1, 1916, keep the time of all men represented in this movement, upon an eight-hour basis and by separate account, monthly, with each man, maintain a record of the difference between the money actually earned by him on the present basis and the amount that would have been earned upon an eight-hour basis, overtime on each basis to be computed *pro rata*. The amounts so shown will be subject to the decision of the commission provided for in paragraph (c) of this memorandum and

payable in money as may be directed by said commission in its findings and decision.

(b) The Interstate Commerce Commission to supervise the keeping of these accounts and report the *increased* cost of the eight-hour basis, after such period of actual experience as their judgment approves or the President may fix, not, however, less than three months."

This proposition could not have been made in good faith, if it was *impossible*, as now contended, to make the eight hours apply, just as the ten hours was, at the time, being applied. In that event the accounts could not have been kept as the carriers proposed to keep them.

(b) Mr. Lovett, for the carriers, contending before the committee (Senate Document 549, p. 73) against the passage of the Act, thus made *increased* expense as the *sole* basis of the argument:

"That problem is as much the problem of Congress—yes, it is more the problem of Congress, than it is of the railroad executives. It involves the appropriation of $60,000,000 per year by whom? By men who, in justice, need it? By men who are underpaid? By men who work the longest hours and do the hardest work for the least money? Not at all. No such question has ever been submitted to any tribunal for consideration or for discussion. No; it involves the appropriation of $60,000,000 of the railroad wage fund by the class of railroad employees who are the best paid men in the service. Now, our treasuries are not bottomless; our resources are not unlimited. We are mere agents for the public in conducting the trans-

portation business of the country. We take in the money and we distribute it again. We distribute it to the laborers and to the security holders. We take in only what the Government says we shall receive. Our revenue is limited. We can take no more than that. That is all we get; it is all we have to use in the improvement and operation of the properties and payment of the men. It is a prime public question for the Government of this country to decide, or for some agency of the Government to decide, if one can be agreed upon. Who is entitled to that $60,000,000 a year—who is entitled to it? Some of the other laborers? These men? Or the public?—who must ultimately pay the bill—or the investors, without whom there cannot be any railroad development in this country? Now, those are the issues we have been insisting should be submitted to arbitration. We, conceiving ourselves as the trustees of the character I have stated, have felt that we could not undertake to decide this. We think this is a subject that ought to be carefully studied in all its relations, by some impartial tribunal. We offered to leave it with the Interstate Commerce Commission. We offered to leave it to arbitration under the Newlands Act. We offered to leave it to any commission the President of the United States might appoint, without having any voice ourselves in the appointment, realizing always that whenever that expense is added to the cost of conducting the transportation business of this country, the public will have to pay it."

Again (*id.* 77), he said:

"Now, gentlemen, I am only one citizen of many, and a railroad officer. I feel that this

problem has passed beyond my jurisdiction. I feel it is a national problem. We have done our utmost to solve it. Whatever Congress sees proper to do about it, of course, *we must abide by*. If Congress wants us to take on this burden, it must say so. My judgment is it would be a great injustice, the greatest injustice that has ever happened in the conduct of the Government in this country, for Congress, with the hands of these four men about its throat, to say that their highly paid followers shall have $60,000,000 more a year out of the remainder of the one hundred million people of this country."

Again (*id.* 79):

"Now, I am going to conclude. If you adopt the eight-hour day, *of course we will have to abide by it.*"

Mr. J. M. Sheean (*id.* 95) of counsel for the carriers, said:

"We have taken the position throughout *that a mandate from any tribunal would be, of course, recognized, bowed to, and carried out by the railroads. Of course, a mandate coming from the people will be bowed to and carried out.* The responsibility, as Judge Lovett said this morning, is yours, not ours."

Each of these men was a lawyer of high character and attainments, each has a wonderfully perfect command of the English language; neither upon such an occasion would use words without weighing their meaning. When, therefore, they were, with discriminating care, selected as

the persons to assure the Senate Committee that the law, if passed, would be obeyed, they, *at least,* solemnly admitted that it was workable and could be enforced.

(c) The judge below is not only a great jurist, but is an able practical man of affairs. The road operated by appellees is not the only one of which he has charge through receivers acting under his orders. He is thus now directing the operation of the Missouri Pacific and Missouri, Kansas & Texas Railways, two of the greatest systems of the west. He had no doubt of the workability of the law, to which his receivers were subject, for in his opinion (Rec. 53) he said:

> "Though the decree of the court in the case here will be final in form, yet because of the exceptional circumstances the plaintiffs will be directed to keep their accounts and be prepared promptly to pay their employees on the basis of the Adamson law should the decree not be sustained."

In the decree below (Rec. 49) this provision appears:

> "Plaintiffs are directed to keep, from on and after January 1, 1917, a separate account of the moneys which would be due employees under the Act if held valid, to the end that if the Act is hereafter held to be valid, they shall promptly pay to the employees affected the amounts due them by virtue of the Act, which right can at any time be enforced herein on motion by defendant for their benefit."

To the foregoing statement and provision in the decree, the appellees made no objection, yet the court below rightly deemed them of sufficient importance to be put in the record.

When the carriers, other than appellees, were asking to take part in the presentation of this case, one of the things to which they agreed (Stipulation, par. 2) as a condition of being accorded the privilege, was this:

> "5. In each pending case except this a consent order shall be entered continuing further action therein until the decision of this court, and providing that plaintiff from on and after January 1, 1917, shall keep its books and accounts in such manner that, if the constitutionality of the Act is upheld, it shall ascertain the amount due to the employees affected under the construction placed upon the Act by this court and shall promptly pay them said amounts, which right can at any time be enforced for their benefit on their own motion or on the motion of the defendant United States Attorney."

If the Act is so unworkable that there can be no compliance with the suggestion and order of Judge Hook and with their own stipulation, then it was an idle ceremony for the carriers so to agree.

(6) The substitution of one work day of a certain number of hours for another with a different number is nothing new. It has never yet been found at all difficult to substitute new or substituted hours per day in any existing schedule. A few pencil notations on Exhibits 1 and 2 (Rec.

35-48) will make it apply in every detail to the requirements of the Act. Any schedule can be taken and from it can be ascertained the hours per day and the *railroad* equivalent of so many total miles at so many miles per hour. If, for instance, one takes ten hours per day, or its equivalent of one hundred miles at ten miles per hour, and desires to substitute the eight-hour day, all he has to do is to change eight for ten in the hours per day, twelve and one-half for ten miles per hour, and use the statutory phrase as to extra time wherever overtime is mentioned. In all other respects the schedule under an eight-hour day will stand just the same as it was when a larger number of hours represented that day. Arbitrations have been repeatedly had (Senate Document 493) where there were involved changes of the number of hours constituting a day's work. No one ever suggested and a change to the new number was not just as workable as that which was previously in effect.

In fact, whenever an award has been made, it has been almost in the verbiage of the Adamson Act, and the arbitrators, as part of the award, have made a detailed application thereof to the existing schedule. Thus, it, as a substitute for the old schedule, at once became operative, no one thereafter ever saying, as is now said of the Act, that the new one, as thus changed, was not workable.

Some of the instances where this has been done are these:

(a) *In re Southern Pacific Co. and Order of Railroad Telegraphers,* 1907 (Senate Document 493, pp. 26-28), the question submitted by the em-

ployees was "a reduction in hours of service on Sundays for employees to five hours," and, as a result of the arbitration, they secured "the adoption of a rule providing for a reduction of the hours of service on Sunday to one-half the regular hours obtaining on week days."

(b) *In re Illinois Central Railroad, Yazoo & Mississippi Valley Railroad, and Indianapolis Southern Railroad and the Order of Railroad Telegraphers,* 1909 (Senate Document 493, pp. 32-35), the arbitration proposed was that certain "hours, including meal hour, should constitute a day's work." The award was that at certain cities, eight hours should so constitute it, and at other places, nine, with certain leaves of absence to those who worked ten hours or more.

(c) *In re Cleveland, Cincinnati, Chicago & St. Louis Railway and the Order of Railroad Telegraphers,* 1910 (Senate Document 493, pp. 42-45), among other things, the employees demanded fixing a new number of hours representing a day's work, and the award provided, in some instances, for nine, and in others, for twelve.

(d) A like situation arose and was likewise determined in *re Baltimore & Ohio Southwestern Railroad and Order of Railroad Telegraphers* in 1910 (Senate Document 493, pp. 45-49).

(e) *In re Railroads in Western Territory and Brotherhood of Locomotive Firemen and Enginemen,* 1910 (Senate Document 493, pp. 50-162), involved forty-nine railroads and an increase of pay for each "one hundred miles or less." The various tables introduced upon the hearing showed there was upon each road a "rate per day of one

hundred miles or less, or ten hours or less," thus recognizing just what was meant, in railroad circles, by the words "ten-hour day." Expressions like these were used: "As ten hours constituted a day's work, the increase in terms of cents was twenty-five cents a day" (p. 147), "the rate of pay to hostlers for a day of twelve hours were increased" (p. 148), "per day of eleven hours and forty minutes" (pp. 153, 154), "per day of eleven hours" (p. 154), time "computed on the ten mile per hour basis" (p. 155), "runs over one hundred miles in the aggregate where time is computed on the ten miles per hour basis" (p. 156), "in freight service of over one hundred miles in the aggregate * * * twelve and one-half miles per hour" (p. 156), and "on the ten mile per hour basis" (pp. 157, 158, 159, 162).

(f) *In re Southern Railway and Order of Railroad Telegraphers,* 1910 (Senate Document 493, pp. 163-166), the demand was for an eight-hour day, the award for nine and ten, respectively.

(g) *In re Coal and Coke Railway Company and Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brotherhood of Railroad Trainmen,* 1911 (Senate Document 493, pp. 175-196), the demand was ten hours or less, one hundred miles or less to constitute a day, and the award (*id.* 196) that the basis of a day's work in freight and mixed train service be reduced from eleven hours to ten or less.

(h) *In re Railroads in Eastern Territory and Brotherhood of Locomotive Engineers,* 1912 (Sen-

ate Document 493, pp. 197-258), involving fifty railroads, the demand was "one hundred miles or less, ten hours or less, to constitute a day's work," and the award "ten hours or less, or one hundred miles or less." The tables prepared (*id.* 238-258) showed the award to be for "per day of one hundred miles, or ten hours or less."

(i) *In re Railroads in Eastern Territory and Brotherhood of Locomotive Firemen and Enginemen,* 1913 (Senate Document 493, pp. 259-314), among other things, arbitration was the demand for a day's work, ten hours or less, or one hundred miles or less will constitute a day's work in all classes of service except as otherwise specified." This involved (*id.* 262) fifty-four railroads. Thirty-eight of these roads (*id.* 265) already had in effect "ten hours or less, one hundred miles or less, a day's work." The award (*id.* 284) for all was "ten hours or less, one hundred miles or less, to constitute a day's work in all classes of service, except as otherwise specified."

(j) *In re Railroads in Eastern Territory and Order of Railway Conductors, Brotherhood of Railroad Trainmen,* 1913 (Senate Document 493, pp. 315-404), involved forty railroads, twenty thousand conductors and eighty thousand trainmen. One of the demands (*id.* 322) was that "in all classes of service other than passenger, one hundred miles, or ten hours or less, shall constitute a day's work, overtime shall be paid for at the rate of fifteen miles per hour." The award (*id.* 322) was an allowance of the request with the exception that overtime should be paid for at * * * ten miles an hour." The railroads

were also authorized to run crews in number of short runs, provided their mileage in the aggregate did not exceed one hundred miles, or their time on duty ten hours.

(k) *In re Chicago, Burlington & Quincy Railroad and Order of Railway Conductors and Brotherhood of Railroad Trainmen,* 1913 (Senate Document 493, pp. 408-436), there were a great many proposals, upon which awards were made and there was then a practical application made of the award (*id.* 432-436), in which the day's work was described as being one hundred miles or less, ten hours or less.

(l) *In re Wheeling & Lake Erie, Wabash-Pittsburgh Terminal, and West Side Belt Railroads and Telegraphers, Telephoners, Station Agents, and Signalmen,* 1913 (Senate Document 493, pp. 437-444), one demand was "eight consecutive hours shall constitute a day's work," and there was an award accordingly, with certain exceptions as to nine and ten hours, respectively.

(m) *In re Georgia & Florida Railroad and Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen,* 1914 (Senate Document 493, pp. 450-456), the requests of the men, in modified form, were granted, by changing the hours of service in varied ways, and "under the wage scale adopted as a result of the arbitration award, the basis of a day's work in switching service is fixed at ten hours or less per day," as compared with a day of twelve hours or less before the award.

(n) *In re Railroads in Western Territory and Brotherhood of Locomotive Engineers and Broth-*

*erhood of Locomotive Firemen and Enginemen,* 1914-15 (Senate Document 493, pp. 456-590), there were ninety-eight railroads parties to the arbitration. The demands were "one hundred miles or less, five hours or less, will constitute a day's work in all classes of passenger service * * *; one hundred miles or less, ten hours or less, will constitute a day's work in all classes of service except passenger and switching service. * * * Ten miles run will be the equivalent of one hour's service performed, or *vice versa.*" The contention (*id.* 464) of the men was that "the five-hour day" was "equitable in passenger service." Again, "a ten-hour day in freight service was conservative, in that practically *all* railroads had as favorable or a more favorable rule." The carriers (*id.* 481) showed that in all their schedules, the day's work was measured by so many miles or less, and hours or less, as constituting "a day's work." The demand for five hours or less in passenger service (*id.* 489) was met by granting "one hundred miles or less, six hours, forty minutes or less, shall constitute a day's work, unless otherwise specified."

(o) *In Norfolk & Western Railroad and its Maintenance-of-way Employees* (Senate Document 493, pp. 593-597), there a change in wages awarded.

(7) But if there were any doubt as to this question of the workability, the court, prior to a test, would not pass upon the question, for the policy here is, where practicable, to require something of that character to be done before restraining the enforcement of any such statute. (*Knox-*

*ville Water Co.* v. *Knoxville,* 212 U. S. 1, 16-19; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 41, 54, 55; *L & N. R. Co.* v. *Garrett,* 231 U. S. 298; *Wadley Southern R. Co.* v. *Georgia,* 235 U. S. 651; *Rail & River Coal Co.* v. *Yaple,* 236 U. S. 338.) Manifestly, no question can be made, even upon the theory of the carriers as to the validity of the Act, so far as it relates to terminal service or men who are not actually moving train miles. Certain it is that no one ever thought that there was an intention to *increase* the number of hours where, as in the then existing passenger service, they were already less than eight. This brings into play a recent remark (*Miller* v. *Wilson,* 236 U. S. 373) of Mr. Justice Holmes:

> "If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."

He had once before (*Keokee, etc., Co.* v. *Taylor,* 234 U. S. 224) put the same idea in these words:

> "It is established by repeated decisions that a statute aimed at what is deemed an evil and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally * * *."

Respectfully submitted,

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# In the Supreme Court of the United States.

OCTOBER TERM, 1916.

FRANCIS M. WILSON, UNITED STATES Attorney for the Western District of Missouri, appellant,
*v.*
ALEXANDER NEW AND HENRY C. FERRIS, as receivers of the Missouri Oklahoma & Gulf Railway Company.
No. 797.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.*

## SUPPLEMENTAL MEMORANDUM FOR APPELLANT.

The following suggestions are submitted on behalf of the appellant in accordance with leave granted at the close of the oral argument.

### THE PRACTICAL APPLICATION OF THE ACT.

It is clear that in the existing schedules and in current use the phrases "day's work" and "day's wage" have a well-recognized meaning. They may be defined as follows:

"Day's work": The period of labor which must elapse before the right to overtime payment begins.

"Day's wage": The contract price payable for this primary period.

The duration of this day's work or primary period may be indicated either by a limitation in hours; *e. g.*, "10 hours or less" shall constitute a day's work; or by a limitation in miles with a guaranteed minimum rate per hour; *e. g.*, "100 miles or less at 10 miles per hour" shall constitute a day's work.

The Adamson Act declares in effect that every employee of the class affected, no matter what his task, shall be considered at the end of eight hours to have earned the contract price payable for a day's work. If he is worked longer, and he may be, such work will constitute overtime and entitle him to extra pay. The economic burden of this extra pay is counted on to produce an actual shortening of hours, and this shortening can be effected without curtailing the mileage of the day's trip if the speed per mile is increased.

If, however, like passenger engineers and conductors, the employee is laboring at a task which can be and usually is accomplished in less than eight hours he is of course unaffected by the act. The purpose was to decrease, not increase, the hours of actual labor. It is only when set to a task of longer duration than eight hours that the act steps in and penalizes the employer by imposing overtime.

It is believed that, in a majority if not in all cases, existing schedules could be brought into conformity with the law by the following indorsement:

> Whenever by this schedule more than eight hours constitutes a day's work the same is hereby reduced to eight hours, whether herein

stated in terms of hours or in terms reducible thereto; and all overtime shall be paid pro rata.

### ADDITIONAL SUGGESTION AS TO REGULATION.

In all cases where the carrier's liberty of contract is called upon to yield to regulation, the regulation must have some real and substantial relation to the reliability, promptness, economy, security, utility or continuity of that transportation by railroad which constitutes interstate commerce. In holding that the regulation of wage contracts has such a real and substantial relation it is not necessary either to affirm or deny (the question of cost as an element in rate-making aside) that Congress has similar power over the price of every commodity which the railroad is called upon to purchase. There is a genuine difference in fact growing out of the essential distinction between animate and inanimate objects; and this difference in fact may give rise to difference in law. Congress of course may require the railroads to purchase safe and adequate locomotives and sound railroad ties, and may fix a standard of quality which will affect indirectly, if not directly, the standard of price; but when the price has once been paid it ceases to have any future relation to the security or continuity of interstate commerce. A good locomotive, no matter how cheaply bought, will render as much service as one of the same quality for which a higher price has been paid; a sound railroad tie will support the rails whether it

costs much or little; but the wage rate to the employee is a continuing and daily factor. An underpaid, overworked, and discontented employee is a constant menace to the security of commerce and a constant danger to its continuous and uninterrupted flow. The size of the pay envelope, it is submitted, has far more bearing on commerce and on the persons engaged in it, master, servant and general public alike, than the rules which shall govern an employee's right of recovery in case of injury or the prospect under an accident compensation act of a fixed annuity to himself or his heirs at law.

Respectfully,

T. W. GREGORY,
*Attorney General.*
JOHN W. DAVIS,
*Solicitor General.*
E. MARVIN UNDERWOOD,
*Assistant Attorney General.*
FRANK HAGERMAN,
*Special Assistant to the Attorney General.*

JANUARY, 1917.

○

FILED
JAN 8 1917
JAMES D. MAHER
Clerk

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1916.

FRANCIS M. WILSON, United States Attorney for the Western District of Missouri,
*Appellant,*
vs.
ALEXANDER NEW and HENRY C. FERRIS, as Receivers of the Missouri, Oklahoma & Gulf Railway Company,
*Appellees.*

No. 797.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

## BRIEF FOR APPELLEES.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

| | |
|---|---|
| FRANCIS M. WILSON, United States Attorney for the Western District of Missouri, Appellant, vs. ALEXANDER NEW and HENRY C. FERRIS, as Receivers of the Missouri, Oklahoma & Gulf Railway Company, Appellees. | No. 797. |

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

## BRIEF FOR APPELLEES.

This case is here upon appeal from a final decree of the District Court permanently enjoining the United States District Attorney from enforcing the Act known as the Adamson Act, upon the ground that that Act is unconstitutional.

Appellees by their bill of complaint sought such injunction and represented: that the Adamson Act was unconstitutional because not a regulation of commerce and because a violation of the Fifth Amendment; that the Act, unreasonably and arbitrarily, would deprive them of their liberty of contract and seriously hamper them in framing contracts with their employees in train service, and thereby, as well as by compelling them, by reason of Section 3, to pay many thousands of dollars, in increased wages, would deprive them of their liberty and property without due process of law, and also would subject them to enormous penalties for the violation of the statute, although it did not supply rules or standards whereby complainants could know how to comply with the

Act; that the Act discriminated against appellees' railroad in favor of various other railroads and operated to compel appellees to discriminate unjustly and arbitrarily in favor of some employees and against many others who have no less right to equal treatment.

Appellant moved to dismiss the bill. The motion was overruled, the court holding the Act to be unconstitutional, null and void, the court stating in its opinion:

> "Upon a consideration of the Adamson law and of what is said of its practical effect and what was intended to be accomplished by it, the judgment is that, as the court construes the terms of the law, it cannot be sustained" (Transcript, p. 53).

Appellant elected to stand upon his motion and declined to plead further; and the court enjoined him from enforcing the Act against the appellees.

The Attorney General and Counsel for the Railway Companies generally, with a desire to obtain, as indicated by the lower court, a final and authoritative determination for the whole country of the constitutional questions involved, joined in the motion to advance the case in this court, and agreed that pending a decision herein by this Court, the suits filed by railroad companies generally throughout the United States to enjoin the enforcement of the Act should be held in abeyance.

## INTRODUCTORY.

### The Adamson Act.

The Adamson Act reads as follows:

> "An Act To establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for

labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the Act of February fourth, eighteen hundred and eighty-seven, entitled 'An Act to regulate commerce,' as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, from any State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States: *Provided*, That the above exceptions shall not apply to railroads though less than one hundred miles in length whose principal business is leasing or furnishing terminal or transfer facilities to other railroads, or are themselves engaged in transfers of freight between railroads or between railroads and industrial plants.

SEC. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its finding to the President and Congress; that each member of the commis-

sion created under the provisions of this Act shall receive such compensation as may be fixed by the President. That the sum of $25,000, or so much thereof as may be necessary, be, and hereby is, appropriated, out of any money in the United States Treasury not otherwise appropriated, for the necessary and proper expenses incurred in connection with the work of such commission, including salaries, per diem, traveling expenses of members and employees, and rent, furniture, office fixtures and supplies, books, salaries and other necessary expenses, the same to be approved by the chairman of said commission and audited by the proper accounting officers of the Treasury.

SEC. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

SEC. 4. That any person violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not less than $100 and not more than $1,000, or imprisoned, not to exceed one year, or both.

Approved, September 3, 1916.

Approved, September 5, 1916."

The Act attempts to control the standard by which the compensation of train-service employees shall be measured, and it attempts also, for a limited period, to increase their wages. That is,

Section 1 of the Act is a permanent provision attempting to prescribe the *standard* by which the wages of train-service employees shall be reckoned; but leaves the parties free to agree as they see fit upon the *amount* of wages to be paid.

Section 3 of the Act is a temporary provision—being intended to operate for not less than 7 nor more than 11

months—attempting to prescribe the *amount* of wages that shall be paid.

Before proceeding with the argument of the constitutional points, we shall, for the sake of clarifying the situation, discuss some matters bearing upon the operation and effect of the Act.

## The Adamson Act Does Not Limit the Hours of Service to Eight.

THE LANGUAGE OF THE ACT SHOWS THAT IT DEALS SOLELY WITH THE CONSTRUCTION OF CONTRACTS AND WITH THE STANDARD AND AMOUNT OF COMPENSATION AND NOT WITH ANY LIMITATION UPON THE HOURS OF LABOR.

Section 1 declares that "eight hours shall *in contracts for labor and service* be deemed a day's work, and the measure or standard of a day's work for the purpose of reckoning the compensation for service of all employees," etc.

The entire Section is controlled by the qualifying clause "in contracts for labor and service." Thus the Act identifies itself as a measure dealing with the *contract* aspect of railroad train service labor, and not with the *physical* aspect of the quantity of service that is permitted.

In view of former decisions,* it was very doubtful whether a general declaration that "eight hours shall in contracts for labor and service be deemed a day's work" would have operated even to control the contracts of the parties so as to substitute the eight hours for any other standard day's work which the parties might *expressly* establish in their contracts.

---

* Notably, United States vs. Martin, 94 U. S., 400, in which the court held that an Act of Congress declaring that "eight hours shall constitute a day's work" for government employees merely "prescribed the length of time which should amount to a day's work when no special agreement was made upon the subject."

Therefore Congress supplemented its general language by the more specific declaration that in such contracts eight hours should be "the measure or standard of a day's work for the purpose of reckoning the compensation for service," and thus tried to reinforce the idea that the compensation for the service covered by the contracts must be measured by eight hours as the standard.

This purpose, which is made clear in Section 1, is emphasized in Section 2, which provides for a commission to "observe the operation and effects of the institution of the *eight hour standard workday as above defined*".

Of course Section 3 could not, even if its language supported the idea of a limitation of hours of service, turn Section 1 into such a limitation *because Section 3 is temporary while Section 1 is permanent.* But Section 3 itself refers only to the "*standard* eight-hour workday," and expressly contemplates additional hours of service, so that Section 3 strongly confirms the view that Section 1 is not a limitation upon hours of service.

## The Other Legislation of Congress Shows That the Adamson Act is Not a Limitation Upon the Hours of Service.

By an Act of Congress of March 4, 1907, known as the "Hours of Service Act," it was made "unlawful for any common carrier * * * to require or permit any employee * * * to be or remain on duty for a longer period than sixteen consecutive hours," and provision was made for ten hours' rest after sixteen consecutive hours on duty and for eight hours' rest after sixteen hours (not consecutive) in any twenty-four hour period.

This provision related to employees "actually engaged in or connected with the movement of any trains" and therefore included all the employees covered by the Adamson Act, *i. e.*, "employees actually engaged in any capacity in the operation of trains."

The Hours of Service Act declares that its provisions "shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left the terminal and which could not have been foreseen." And further provides that its provisions "shall not apply to the crews of wrecking or relief trains."

The Hours of Service Act further declares it to be the duty of the Interstate Commerce Commission "to execute and enforce the provisions of this Act." The court is aware from the annual reports of the Interstate Commerce Commission to Congress that an important branch of the work of the Commission is the administration of the Hours of Service Act.*

The Adamson Act does not purport to repeal or amend the Hours of Service Act and makes no reference to it. The Interstate Commerce Commission is given no power or duty respecting the Adamson Act.

If the Adamson Act is a limitation upon the hours of service then it by implication repeals or amends the Hours of Service Act of March 4, 1907. No one pretends that such repeal has taken place, or that any change has taken place in the rule of law which limits the hours of train service to sixteen or which requires the Commission to enforce that rule. Inextricable confusion would result from the effort to construe the two statutes together as a composite dealing with the subject of the limitation of the hours of service.

By the Hours of Service Act Congress adopted legislation in appropriate terminology dealing in an intelligent and consistent way with the subject-matter before it, *i. e.*, the limita-

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* Annual Reports of Interstate Commerce Commission:
1913, pages 62–67.
1914, pages 49–53.
1915, pages 51–55.
1916, pages 47–53.

tion of the hours of labor. By the Adamson Act Congress adopted legislation dealing with the standard and amount of compensation and leaving the Hours of Service Act unimpaired and its enforcement according to its language and the established methods in the hands of the Interstate Commerce Commission.

## There is no Basis for Establishing by Implication Any Limitation Upon the Hours of Service.

What we have already said shows not only that the language of the Adamson Act does not expressly limit the hours of service, but also that the language is so clear as not to admit of any implication that there is a limitation of hours of service. But we go further and invoke the method adopted by this Court in Interstate Commerce Commission vs. Railway Company (the Maximum Rate Case), 167 U. S., 479, to show that there can be no implication indulged in here to establish a limitation upon the hours of service.

In the case cited, the court declined to recognize, by any process of implication, that Congress had given the Interstate Commerce Commission the power to fix rates and said:

> "The question debated is whether it vested in the commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication" (pp. 494, 495).

THE LANGUAGE FOR LIMITING THE HOURS OF TRAIN-SERVICE HAS BEEN OFTEN USED AND IS FAMILIAR TO THE LEGISLATIVE MIND AND IS CAPABLE OF DEFINITE AND EXACT STATEMENT; AND NO SUCH LANGUAGE WAS USED IN THE ADAMSON ACT.

There has been a great mass of legislation limiting the hours of train-service employees. The forms of expression have come to be well understood. They all conform closely to the phraseology used by Congress in the Hours of Service Act. None of them conforms at all to the language used by Congress in the Adamson Act. This will be made clear by a reference to such legislation which has been adopted from time to time by twenty-six different states during a period of twenty-three years, from 1891 to 1913, both inclusive. Excerpts from these State Statutes are set out in Appendix I.

In view of the well established forms of legislative expression in limiting the hours of service of train service employees, there can be no basis for the court attempting to construe as a limitation of hours of service a statute which uses language which neither according to its ordinary meaning nor according to settled legislative practice has any connection with the limitation of hours of service but which obviously deals only with the standard and the amount of compensation.

The New York statute, May 20, 1892, and the decision of the New York Court of Appeals thereon are of interest in this connection. The statute was entitled "An act to provide for and limit the hours of service on railroads," and reads as follows:

> "SECTION 1. No person, persons, or corporation operating a line of railroad of thirty miles in length or over, in whole or in part, within this state, shall permit or require any conductor, engineer, fireman or any trainman who has worked in any capacity for twenty-

four hours, to again go on duty or perform any kind of work until he has at least eight hours' rest.

S. 2. Ten hours' labor performed within twelve consecutive hours shall constitute a day's labor in the operation of all steam surface and elevated railroads owned and operated within this state, provided that this provision shall not affect the mileage system in operation, or that may hereafter be placed in operation, or trips of regular scheduled trains when completed with a less number of hours, and it is further provided that the provisions of this act shall not apply to extra hours of labor performed by any conductor, engineer, fireman or trainman in cases of unavoidable accident or delay caused by such accident.

S. 3. For every hour in excess of said ten hours' labor that any conductor, engineer, fireman or any trainman of any railroad company or corporation, owned or operated within this state, who works under the direction of a superior, or at the request of such company or corportion, shall be required or permitted to work, he shall receive comparative compensation for said extra service in addition to his daily compensation.

S. 4. Any railroad company or corporation, or any officer, agent or employee of any such company or corporation, violating or permitting the violation of any of the provisions of this act, shall be guilty of a misdemeanor, and, on conviction, shall be punished by a fine of five hundred dollars for each offense.

S. 5. This act shall take effect immediately."

A railroad superintendent was indicted for employing a trainman at a fixed price per day, and requiring him to work as and for his day's work fourteen and a half hours continuously, and refusing to pay him for the extra time over ten hours.

The court held that the only portion of the statute limiting the hours of service was Section 1, and that Sections 2 and 3 were but a statutory definition of what shall constitute a day's labor and would control in any controversy affecting the civil

liabilities of the employer in the absence of an express agreement to the contrary, and said there was no prohibition aimed at the railroad company against permitting or requiring more hours of labor during the calendar day. The court held that a demurrer to the indictment should have been sustained (People v. Phyfe, 136 N. Y., 554).

This New York statute presents interesting analogies to the legislation of Congress. Section 1 of the New York statute is a limitation of hours of service similar to the Federal Hours of Service Act. Sections 2 and 3 of the New York statute deal with the standard measure for compensation somewhat similarly to the method by which that subject is dealt with by Section 1 of the Adamson Act.

THE LIMITATION TO EIGHT HOURS OF SERVICE WOULD SO LARGELY AFFECT THE RIGHTS OF THE CARRIERS AND THE SHIPPERS AND THE CONSUMING PUBLIC, THAT ITS ESTABLISHMENT BY MERE IMPLICATION SHOULD NOT BE TOLERATED.

A limitation to eight hours of service is a matter that largely affects the rights of carrier and shipper and also the interests of the general public, and this of itself is a reason why a limitation to eight hours of service by mere implication should not be tolerated even if there were any possible basis for such implication.

The peculiar character of railroad train service is such that it is impossible to reduce the hours of train service employment to eight except by shortening the distances between railroad terminals or "division points." This is true because in the ordinary conduct of railroad business the trainmen cannot be relieved from service except at an appropriate terminal and it is impossible to get other employees to take their places for the operation of the train on its further journey except at an appropriate terminal.

In the Hours of Service Act of 1907, limiting hours of train service to sixteen it was provided that the Act "shall take effect and be in force one year after its passage."

The House Committee in its report upon the bill, which in its final form became the Hours of Service Act, stated:

> "Owing to the probable necessity of changing in some instances division points, entailing the removal of employees, and to permit ample time to readjust themselves to the requirement of the law. it is not to become operative for one year after its approval" (Fiftv-ninth Congress, Second Session, H. R. Report No. 7641, February 16, 1907, to accompany S. 5133).

If a statute limiting hours of train service to sixteen would probably necessitate in some instances the changing of division points and entail the removal of employees, what would be necessitated in those directions by a statute cutting in half the hours of train service and reducing them to eight?

It is an accepted fact that in the ordinary handling of railroad trains, to a very large extent in the case of freight trains and to an important extent in the case of passenger trains, it requires more than eight hours, and frequently more than ten hours, to get the trains from their initial terminal to their final terminal where the employees live and where substitute employees are obtained.

Any plan to limit hours of train service to eight would necessitate throughout the country the most extensive abandonment of existing terminals, with their costly shops, round houses, yards and other facilities, and the reconstruction of new terminals closer together and would involve the bodily transfer of enormous numbers of employees with their families from their present homes to new locations, and thus would to a large extent destroy great numbers of existing communities.

Even if a statute were open to two constructions, one a limitation to eight hours of train service, and the other a provision for the standard and amount of compensation, the court, by the very contemplation of the serious consequences of the former construction, would feel impelled to adopt the latter. Certainly the court would not impute to Congress an intent to cause such a far-reaching disruption of existing conditions in the absence of language clearly expressing that intent.

THE LIMITATION TO EIGHT HOURS OF SERVICE COULD NOT BE ACCOMPLISHED BY SPEEDING UP THE TRAINS, AND SUCH A STEP WOULD BE FRAUGHT WITH SUCH IMPORTANT DISADVANTAGES TO THE PUBLIC THAT NO PURPOSE TO ENCOURAGE SUCH A RESULT SHOULD BE IMPUTED BY IMPLICATION TO CONGRESS.

Perhaps it will be argued that this disruption of existing conditions through the change of the location of terminal facilities could be avoided by running trains at a higher rate of speed. Such an argument would assume that higher speed, sufficient to accomplish such object is practicable. But there are no facts to sustain this assumption. On a division 150 miles in length, a freight train would have to be run at a speed high enough to average 18¾ miles per hour, notwithstanding stops and delays, in order to get over the division in eight hours. There is nothing to support the view that such a speed could be maintained. The employees demanded, for purposes of computing overtime, only a speed of 12½ miles per hour.

Such an argument would also assume that if the trains were scheduled at the higher rate of speed that higher speed could, generally speaking, be realized in practice. But there are no facts to sustain this assumption. As will be pointed out below, the only way to increase the speed would be to

diminish the train load, and consequently to increase the number of trains. It would be an open question whether with an increased number of trains an increased average speed could be realized. It is a mathematical proposition that on a single track railroad the number of meeting points increases according to the square of the number of trains. For example, if there are four trains moving in each direction on a division, there will be sixteen meeting points ; but if there are six trains moving in each direction, there will be thirty-six meeting points. Obviously, every additional meeting point offers additional opportunities for delay, because two trains which are to meet do not always, or even generally, arrive at the meeting point at the same instant, and both are delayed by whichever one is late, and these delays cumulate with reference to other meeting points. Therefore, it is not for the court to assume that even on a division 100 miles in length the placing of the trains on a fast schedule would actually get them over the division in eight hours. But as to a division substantially longer than 100 miles, there is not even a plausible contention that they can be gotten over the division in eight hours.

Such an argument would assume also that safety would be promoted by multiplying the number of trains and running them at higher speeds. But the probabilities are that safety would be substantially diminished.

But there is another highly important reason why the court should not attribute to Congress, in the absence of an express declaration to that effect, a purpose to impose a duty which (if we assume that the entire map of terminal facilities is not to be reconstructed with the destructive and disrupting consequences above suggested), would be complied with even in part by speeding up of trains. This reason is that one of the principal causes which has produced the existing low rates has been the great economy

effected through heavy train loading; and that economy would be largely destroyed if train loads had to be lightened so that they might be moved at a higher speed.

That a substantial increase in the speed of freight trains will mean a serious diminution in the train load is a matter of common knowledge. It is an established proposition of the mechanics of railway operation. As an illustration, we quote at length in Appendix I (p. 11), from a scientific article on the subject suggesting that ten miles per hour is the economic speed for freight trains, and that an increase to twelve miles per hour will reduce tonnage 15 per cent.

In the Eastern Rate Advance Case, decided by the Interstate Commerce Commission February 22, 1911, 20 I. C. C. Reports, 243, the Commission considered the question whether the increased expenses of railroad companies entitled them to make an increase in their rates. The Commission was of the opinion that such increased expenses were not a sufficient reason for increases in rates because the companies had been able to adopt certain economies which offset these expenses and the Commission also suggested that increased rates could not be permitted for the purpose of paying extravagant wages to railroad employees. One of the principal economies emphasized by the Commission was the increased trainloading.

In the Five Per Cent. Case, decided July 29, 1914, 31 I. C. C. Reports, 351, the Commission declared unreasonable in part the rate advances proposed by the railroads. In this case also the railroads contended that they were entitled to an increase in rates by reason of increased expenses, and again the Commission emphasized that the railroads had been able in part to offset these increases in expenses by important economies in operation. Again the Commission treated the increased train loading as one of the most important economies enabling the railroads to offset without rate increases the heavy increases in wages.

Among other things, the Commission called attention to the following data:

| Name of Road. | Average freight-train load. | | Increase. | | Average daily wage, all employees. | | Increase. | |
|---|---|---|---|---|---|---|---|---|
| | 1903 | 1913 | Tons | Per cent. | 1903 | 1913 | Amt. | Per cent. |
| | Tons | Tons | | | | | | |
| Pennsylvania R. R. | 552.59 | 700.80 | 148.21 | 26.82 | $2.06 | $2.78 | $0.72 | 34.99 |
| Baltimore & Ohio R. R. | 416.43 | 619.97 | 203.54 | 48.88 | 2.01 | 2.45 | .44 | 21.85 |
| New York Central & Hudson River R. R. | 367.79 | 497.84 | 130.05 | 35.36 | 2.11 | 2.69 | .58 | 27.49 |
| Norfolk & Western Ry. | 486.27 | 763.84 | 277.57 | 57.08 | 1.85 | 2.55 | .70 | 37.84 |
| Kanawha & Michigan R. R. | 444.97 | 937.02 | 492.05 | 110.58 | 1.90 | 2.62 | .72 | 37.89 |
| Hocking Valley Ry. | 611.49 | 987.81 | 376.32 | 61.54 | 2.04 | 2.41 | .37 | 18.14 |
| Pittsburg & Lake Erie R. R. | 866.57 | 1257.00 | 390.43 | 45.05 | 2.07 | 2.73 | .66 | 31.88 |
| Bessemer & Lake Erie R. R. | 917.70 | 1108.66 | 190.96 | 20.81 | 2.06 | 2.62 | .56 | 27.18 |

Extracts from the Commission's opinions in these two cases are set forth in Appendix I, pages 8–11.

A further self-evident proposition is that an increase in the number of trains, in the hope of bringing about an increase in speed, would call also for an increased investment in locomotives, and in facilities necessary to accommodate additional locomotives, thereby increasing the investment upon which a return must be produced by the rates paid by the public.

Therefore, the ability of railroad companies to maintain themselves with the minimum of increases in rates depends very largely upon their ability to maintain their increased freight train loading, and thereby offset as far as possible the heavy increases in expenses, and notably the heavy increases in wages. It would be a grave step for Congress to require the railroads to lose the benefit of a large part of these economies through a speeding up of trains and a consequent loss in train loading and increase in investment, even if such a step

would result in restricting the hours of train-service to eight. Certainly the courts will leave to Congress the responsibility of taking this step by express enactment, and would not themselves effect this change by unnecessary implication even if the basis existed for such implication.

PRESENT CONDITIONS DO NOT SUPPORT THE VIEW THAT AN ABSOLUTE LIMITATION TO EIGHT HOURS OF WORK FOR ALL CLASSES OF EMPLOYEES IN ALL CLASSES OF TRAIN SERVICE WOULD HAVE A SUBSTANTIAL RELATION TO THE PROMOTION OF SAFETY. HENCE SUCH A LIMITATION WOULD RAISE A GRAVE CONSTITUTIONAL QUESTION WHICH OUGHT NOT TO BE RAISED BY UNNECESSARY IMPLICATION.

The power of Congress to limit the hours of service is a power to promote the safety of interstate transportation. There is nothing whatever in the present conditions of railroad operations to justify the court in the belief that a limitation to eight hours of train service is reasonably necessary or appropriate to promote safety, or has anything more than a fanciful relation to that subject. No other business in the country has been subjected to such intense and prolonged scrutiny on the part of the Government as has been the railroad business. Yet this public scrutiny has never resulted in any serious suggestion that the safety of interstate transportation or the employees engaged therein has been endangered or in any way involved by requiring the engineers, firemen, conductors and brakemen, who accompany trains to remain on duty in excess of eight hours. There has been a definite legislative judgment on the part of Congress, and to a largeextent on the part of State legislators, that such service in excess of sixteen hours does involve a danger to transportation and transportation employees. One or two States have put the limit as low as fourteen hours. But the very consensus of legislative opinion on this point would tend to raise a serious question whether, at a single stroke, without

any change in condition tending to suggest the necessity therefor, Congress could cut in half the existing limit of train service, and justify that action upon the plea that it was reasonably necessary for the promotion of safety.

The Interstate Commerce Commission, in its report for 1908, referring to the Hours of Service Act of March 4, 1907, said:

> "The incidents immediately preceding the passage of the act and the circumstances connected with and surrounding its adoption leave little doubt as to the purpose of Congress to minimize the dangers incident to railroad travel, by preventing men from being overworked. Of, course, the period for which railroad employees may, without hardship, perform their duties varies with their physical condition, but the hours of service prescribed by the act are such as the legislature has, from experience and observation, learned that men of their calling and in the ordinary state of health may consistently observe" (Twenty-second Annual Report of Interstate Commerce Commission, p. 48).

In Erie R. Co. vs. New York, 233 U. S., 671, 683, the Court said:

> "The 'Hours of Service' law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it."

Certainly if Congress, on the basis of experience and observation, reached the conclusion in 1907 that train service employees could remain on duty for sixteen hours without being so overworked as to endanger railroad travel, and that sixteen hours constituted the extent of the restriction necessary, nothing has since occurred to justify the judgment that this limit needs to be reduced to eight hours.

The Interstate Commerce Commission, in its report for 1912, in discussing the Hours of Service Act of 1907, said:

> "Instances in which excessive hours of service have contributed to railroad accidents seem to have almost disappeared, and while the aggregate number of cases of excess service, as reported by the carriers themselves, is still unduly large the decrease in such instances as to individual roads has been appreciable" (Twenty-sixth Annual Report of Interstate Commerce Commission, p. 59).

This comment as to the efficiency of the Sixteen Hour Act in causing almost the entire disappearance of railroad accidents due to excessive hours strikingly refutes any suggestion which could be made that Congress, out of a clear sky, without any unfavorable developments on the subject, could find a constitutional justification for cutting in half the hours of train service for the purpose of avoiding railroad accidents.

It will be noted, furthermore, that the Adamson Act applies alike to all employees accompanying the train, to brakemen, conductors and firemen, as well as to engineers. It applies equally to slow freight trains and to fast passenger service. There might be some plausible suggestion that a locomotive engineer on a fast passenger train, making practically no stops, ought to have some special limitation of his hours, in view of the at least theoretical concentration which he must put upon his work. But there would be no basis for applying the same reasoning to the employees on a slow freight train, and especially to the conductors and brakemen, whose activities while in service are intermittent.

One of the peculiarities of train service is that the employees do not have to work arduously and continuously during the hours they are on duty. Much of the delay on the road, at least as to through trains, is due to waiting for orders

or for other trains to pass, when the employees do not ordinarily have any arduous or continuous work to perform. Even when the trains are in motion the conductors and brakemen (in these days of air-brakes) do not ordinarily have to engage in anything like continuous labor. Nor is it generally the case that even the fireman has to work continuously while the train is in motion and on oil-burning locomotives his labor is far from continuous or arduous.

It would be a matter for very serious consideration whether an indiscriminate limitation to eight hours of train service in respect of all sorts of trains and all sorts of train service employees would be regarded on the one hand as having a reasonable and appropriate relation to the promotion of safety, or, on the other hand, as being an arbitrary interference with the constitutional rights of the parties. Certainly the court ought not unnecessarily to raise this grave question by attributing to Congress a purpose to limit the hours of train service in the interest of safety of transportation, when such limitation is not expressed in the Act, and is repugnant to all the considerations above mentioned, and is utterly opposed to what the court knows from the legislative history of the Act was the motive of Congress in its enactment.

These considerations are further emphasized by the far-reaching practical consequences of such a limitation. The destructive rearrangement of terminal facilities which would be required in order to bring the runs of all trains within eight hours, the abandonment of expensive structures and rebuilding of those structures, the abandonment of important communities, and all the other steps which would have to be taken to comply with such a limitation to eight hours of service, all make it extremely doubtful as to whether Congress at a single stroke would have the constitutional power to reduce by half the present maximum limit of sixteen hours.

A Study of the Foregoing Factors Gives Additional Emphasis to the Proposition that the Act is Nothing Except What it Purports to be, to wit: a Direct Attempt to Regulate the Method of Computing Compensation and to Fix the Amount Thereof.

## The Methods of Reckoning Compensation of Trainservice Employees.

Since it will be impossible to discuss intelligently some branches of this case, except by referring to the characteristics of the subject-matter with which the Act deals, we print in a separate volume as Appendix A a summary of the methods of reckoning the compensation of trainservice employees. In brief, that summary shows:

The peculiarities of railroad train service necessitate that employees engaged therein shall remain on duty until the train reaches its terminal. To a large extent, the terminals are more than 100 miles apart, many being as much as 130 and 140 miles or more apart. The wage schedules rarely provide for any limitation of the hours of service, the Federal Sixteen Hour Act being regarded as the only limitation in this respect.

Each of the four classes of train service employees, engineers, firemen, conductors and brakemen, has different rates of pay, and frequently different methods of pay, but, in many instances, the pay of engineers and firemen is reckoned according to the same method though at different rates, and in many instances the pay of conductors and brakemen is reckoned according to the same methods, though at different rates. Each class of service, passenger, through freight, local freight, mixed freight-and-passenger, work-train, wreck train, "helper" locomotives, circus trains, may have different rates and methods of pay. Rates and methods of different railroad systems may vary to a considerable extent, even in the same part of the country. Rates and methods on one part of

a system may differ from those on other parts. Rates and methods on main lines frequently differ from those on branch lines, and the latter frequently differ from each other. In a vast number of cases, fixed rates are paid for specified trips. In many important cases, wages as to each trip have to be computed on two different bases, an old and a new, so the employee can have the benefit of whichever produces the higher amount. There are, of course, many other special variations.

Some of the most important and frequently used methods of arriving at this pay are the following :

1. Employees may be paid at a fixed rate per mile, being guaranteed pay for a certain number of miles per trip as a minimum in cases where the run is less than that number of miles. For example, such basic rates per mile with a minimum of 100 miles constitute an important method of payment to engineers and firemen in all classes of service and to conductors and brakemen in freight service ; a basic rate per mile with a minimum of 155 miles is frequently used to compute the pay of conductors and brakemen in passenger service in the East and South ; but cases are found of various other mileage minima in freight service such as 75, 114, 133, 150 miles and of other minima in passenger service such as 159, 162 miles, etc.

2. Employees are frequently paid on the basis of a lump amount for a specified run. For example, a freight conductor may be paid the lump sum of $4.33 for a run of 118.7 miles from Marysville to Wilkes Barre, Pa. In such cases the particular run is separately specified in the schedule. Here the only basic rate is the total rate for the trip and not a basic rate per mile or per unit of miles.

3. Employees are frequently paid a monthly salary on the assumption that they will make a designated run every day in the month, or every working day in the month, or will make the run two days and have a layover the third day, or,

according to some other method of assignment will make a specified run a certain number of times per month. Here also the only basic rate is the month's pay and not any rate per mile or per mileage unit. Examples of this are afforded by many crews in branch line service and by conductors and brakemen (and sometimes engineers and firemen) in local freight service in various parts of the country.

4. Employees are frequently paid a monthly salary on the assumption that they will make a certain amount of mileage per month. For example, to a large extent in the West conductors and brakemen in through passenger service are paid a monthly salary for more than 4,000 and not more than 6,000 miles per month.

Other variations are so numerous as not to admit of complete classification, but the foregoing are fairly suggestive of the principal methods.

In nearly all train service the wage schedules attempt in some way to protect the employees against abnormal delays upon the road. Where the pay is computed according to some basic rate per mile or per unit of miles, this protection is frequently afforded through the expedient of providing in the schedule that overtime at some fixed rate per hour shall be paid for time consumed on the run in excess of what would have been consumed if an agreed average speed—usually referred to as the "speed basis"—had been maintained. For example, engineers, firemen, conductors and brakemen in through passenger service, in the East and South, are generally, although not always, given a "speed basis" of 20 miles per hour, so that if a trip of 155 miles require more than 7 hours and 45 minutes, "overtime" is paid for the additional time required at some fixed rate of pay per hour. In freight service, if the pay is per mile, the speed basis is frequently ten miles per hour. There are numerous ways of expressing this "speed basis." One way is the direct way of providing that if the run is not made at a specified average speed per

hour, overtime shall be paid. Another is the indirect way of providing that a given number of hours shall be the equivalent of the mileage unit, for example, that "100 miles or less, 10 hours or less, shall constitute a day," which means that the 10 hours is the equivalent of the 100 miles, or, in other words, that the guaranteed speed basis is 10 miles per hour.

When the pay is arrived at on the basis of a lump figure for the trip or is a monthly salary for an understood number of trips on a designated run, the way frequently employed for protecting the employee against abnormal delay is to provide that he shall be paid overtime at some understood rate per hour after a specified number of hours. This number of hours depends, of course, upon the character of the run and may be for example, 3, 6, 9, 10, 11 or 12 hours, and even on the same road these overtime provisions are not likely to follow any uniform speed basis.

Another way of computing overtime to protect the employee against abnormal delays is to provide that he shall be paid overtime if the train's arrival at its final terminal is more than a designated number of minutes behind its time-table hour for such arrival

It will be readily understood that these various methods of pay and methods of computing overtime may be combined in numerous other ways and that there may be still other methods applicable in different parts of the country to a greater or less extent.

Even after the speed basis or its equivalent is provided, there is a great variety of methods in computing the amount of overtime. Examples are: the employee's total time may be figured from the time he reports for duty, or, in other cases it may be figured from a time beginning, say, 30 minutes after he reports for duty; in many cases, 30 minutes or less of overtime may not be counted, and more than 30 minutes and not less than an hour may be counted as an hour; in other cases, the overtime may be figured on a "minute" basis.

This matter is further illustrated by the demand (set forth in the transcript, pages 17 and 18, as proposition 35) of the train service employees, which was the basis for the strike which was threatened last August, the first article being as follows:

> "*(a)* In all road service 100 miles or less, eight hours or less will constitute a day except in passenger service. Miles in excess of 100 will be paid for at the same rate per mile.
>
> "*(b)* On runs of 100 miles or less overtime will begin at the expiration of eight hours.
>
> "*(c)* On runs of over 100 miles overtime will begin when the time on duty exceeds the miles run divided by 12½ miles per hour.
>
> "*(d)* All overtime to be computed on the minute basis and paid for at time and one-half times the *pro rata* rate.
>
> "*(e)* No one shall receive less for eight hours or 100 miles than they now receive for a minimum day or 100 miles for the class of engine used or for service performed.
>
> "*(f)* Time will be computed continuously from time required for duty until release from duty and responsibility at end of day or run."

A leading feature of this demand was to obtain payment for overtime on the 12½ mile speed basis, that is, to get additional pay for all the time on duty in excess of the time which would have been required if an average speed of 12½ miles had been obtained. Since the demand contemplated that 100 miles should be the unit of payment, the time factor had to be, as a matter of mathematical necessity, eight hours so as to produce the 12½ mile speed basis.

A highly important characteristic of this demand was that it contemplated that compensation should be computed on the basis of 100 miles as a unit, not only in the cases where it was already so computed, but also in the great mass of cases where in the past it had been computed on other

bases, some of which are described or suggested above. Therefore if the railways had granted this demand, it would have been necessary, in order to put it into effect, to establish rates per 100 miles or less in all cases where such rates were not already established.

In addition to the rates and rules designed to pay the employees for their runs and to pay them overtime when the agreed speed is not maintained, the wage schedules contain a great variety of provisions for extra pay for incidental services connected with the runs, such as switching, loading or unloading live stock or material, "going for water", doubling hills, etc., etc., and for additional pay for delay at initial and final terminals. The demand of the employees provided for the preservation of all such advantages, as appears from the fourth article of that demand, reading as follows:

> "ARTICLE 4. Any rates of pay, including excess mileage or arbitary differentials that are higher, or any rules or conditions of employment contained in individual schedules in effect January 1, 1916, that are more favorable to the employees, shall not be modified or affected by any settlement reached in connection with these proposals. The general committee representing the employees on each railroad will determine which is preferable and advise the officers of their company. Nothing in the settlement that may be reached on the above submitted articles is to be construed to deprive the employees on any railroad from retaining their present rules and accepting any rates than may be agreed upon or retaining their present rates and accepting any rules that may be agreed upon" (Transcript, p. 6).

It is to be remembered that the demand of the employees did not apply at all to the passenger road service, to which, however, the Adamson Act applies as fully as it does to the freight and other forms of road service.

The demand of the employees, in Articles 2 and 3 thereof

(Transcript, p. 18), also applied to switching and hostling services, but the Adamson Act applies only to employees actually engaged in the operation of trains.

## No Support for the Constitutionality of this Act Can be Derived From Any Theory That it Establishes a Public Policy That Hours of Train Service Should be Shortened, And Has a Direct Tendency to Promote That Policy.

If the argument shall be made that the real effect of the Adamson Act is to establish, for the purposes of computing overtime, the 12½ mile speed basis demanded by the Brotherhoods and that this represents a public policy that hours shall be shortened to promote the interests of interstate transportation, and that the Act has a direct tendency to promote that policy, the answers are clear.

I.

In any event, Section 3, which deals merely with the *amount of wages*, has no legal tendency to promote any such policy. Even if it be assumed, for the sake of argument, that Congress has declared that trains ought to be run at a speed of 12½ miles per hour and has provided for the payment of overtime on a speed basis of 12½ miles per hour, and if it be assumed that such overtime basis has a direct tendency to effectuate the declared policy that a speed of 12½ miles per hour shall be maintained, it is nevertheless evident that an increase in the amount of pay would not be a material circumstance in promoting the declared policy. For example, an increase in an employee's pay from $4.00 per 100 miles to $5.00 per 100 miles would have no legal bearing upon the tendency of the 12½ mile speed basis. To say that an increase in the $4.00 rate per 100 miles to $5.00 would have

a direct tendency to promote the observance of the speed basis, would be to say that the greater the wage increase, the clearer its constitutionality. If an increase from $4.00 to $5.00 per 100 miles would have some tendency in the direction of insuring a speed of 12½ miles per hour, then, of course, an increase from $4.00 to $8.00, or $10.00 per 100 miles, would have a still greater tendency in that direction.

## II.

Even if Section 1 could be construed as putting into effect the 12½-mile speed basis for the computation of overtime, that section would not be a declaration of a legislative policy that in order to promote the interests of interstate transportation trains ought to be speeded up and hours of train service shortened, because it would still leave to the railways and their employees the unlimited discretion to disregard the speed basis whenever their private interests prompted them to do so.

If Congress has a constitutional power to enact policy A if it thinks that is necessary to prevent injury to the public interest, but instead provides that either the private parties affected must observe policy A or, instead, may, by making private arrangements among themselves, pursue policy Z, which is the very opposite of policy A, and which is an injury to the public interest if policy A is a benefit to the public interest, it is obvious that there is no basis for the conclusion that Congress has in fact declared that policy A is demanded by the public interest and shall be the law.

Not only the unlimited option left to the private interests involved makes it clear that no public policy has been declared in favor of increased speed, but the important conditions above stated show that the court could not tolerate the creation by mere implication of any policy not clearly expressed to the effect that all trains should be run at speeds

high enough to average (notwithstanding stops and delays) not less than 12½ miles per hour.

The Employers Liability Cases, 223 U. S., 1, may be cited as authority for the view that the court will uphold a statute on the ground that it tends to promote a purpose within the power of Congress, even though Congress has not directly legislated upon that purpose. But the citation would not be in point. The purpose which Congress was seeking to promote by the passage of the Employers Liability Act was the use of due care by railroad companies, the use of safe machinery and equipment, and the due observance of the safety appliance laws. All these things were universally recognized matters of public policy about which there could be no possibility of dispute. Nobody could say that it was doubtful whether Congress wanted to encourage due care and the use of safe machinery and the observance of the Safety Appliance Acts. When Congress, therefore, enacted legislation having a reasonable and substantial relation to those undoubted matters of public policy, there could be no question of the propriety of the legislation.

The Adamson Act, however, does not establish any public policy that trains shall be run at a speed of 12½ miles per hour, and certainly no such public policy can be said to exist independently of express Federal legislation. There is not and never has been in any jurisdiction, State or Federal, a public policy to the effect that the railroads ought to lighten their trainloads and multiply the number of their trains and increase the investment in equipment and facilities so as to try to run all trains at an average speed (notwithstanding stops and delays) of 12½ miles per hour; there has never been any expression of legislative judgment that the multiplication of trains and the increase of speed would increase safety rather than decrease it; there has never been any legislative judgment that these steps would, (in view of the great increase in meeting and passing

points), in fact expedite the transportation instead of delaying it still further; and, on the other hand, there is the declared policy of Congress, which has not been changed by any legislation whatever, that it is lawful for railroad trains to be on the road without change of crews as much as sixteen hours.

Any argument to sustain this act on the ground of any supposed tendency to shorten hours can only mean that Congress may pass a statute outside of its powers merely because the statute has a tendency to accomplish something which is within its powers, but which Congress has seen fit not to enact. Legislative power cannot be exercised on any such theory. It is true that Congress may act upon matters within its jurisdiction, even though its action incidentally affects matters outside of its jurisdiction. But it is not true that Congress may act on matters outside of its jurisdiction and justify that action by saying that incidentally that action promotes some purpose (not acted upon by it) within its jurisdiction.

Furthermore, it must be emphasized that the mere necessity for paying overtime on a 12½ mile speed basis (as compared, for example, with the necessity of paying overtime on a 10 mile speed basis), cannot be said to have any substantial tendency even in an indirect or incidental way to cause the 12½ mile speed to be generally put into effect, in view of the established conditions of railroad operation.

The court knows from the declarations of the Interstate Commerce Commission that heavy loading of freight trains has been largely resorted to by the railroad companies in order to offset the serious increases in wages and other expenses which have taken place in recent years. There can be no dispute that the speeding up of trains means the substantial reduction of the trainloads and consequently the loss of a substantial part of the economies which the railroad companies have been able to realize. Reducing the trainloads means an increase in the number of trains and consequently an increase

in the investment in locomotives and in the tracks and other facilities needed to care for additional locomotives and trains. Increasing the number of trains means an increase in the number of meeting and passing points and raises a serious question as to whether movement will be expedited or safety promoted by such a chance. In view of all these factors there can be no reasonable basis for the assumption that the railroad companies would or could speed up their trains so as to be able to shorten the hours of train service. Certainly too many contingencies are involved to justify the court declaring that a substantial basis exists for the conclusion that the establishment by law of a 12½ mile speed basis for computing overtime would have a direct tendency to cause trains to be speeded up.

In the hearings before the Senate Committee on the Adamson Bill, Messrs. A. B. Garretson and W. G. Lee on behalf of the Brotherhoods both insisted that in the absence of "punitive overtime," *i. e.*, "time and a half for overtime" the 12½ mile speed basis would not speed up the trains; there would be no incentive to shorten hours according to Mr. Garretson (Senate Hearing, p. 37); and Mr. W. G. Lee incated that the so-called eight-hour day "is practically useless so far as shorter hours is concerned unless the company is penalized in some way for working men after the expiration of eight hours or the expiration of the time necessary to form the basic day by dividing the day by the mileage, 12½ miles, instead of 10 miles as at present" (Senate Hearing, p. 63). He reiterated this view on page 66 and again on page 68, saying that without time and a half for overtime "we should probably be against exactly the same condition as the eight hour or 12½ mile speed basis that we are against today under the 10 mile hour speed basis."

Mr. Elisha Lee, the Chairman of the Conference Committee of the Railroads, and their principal spokesman in this matter,

explained the studies and conclusions of the railroads with reference to the demands of the employees. He said:

> "Since these propositions have been brought to our attention rather elaborate studies have been made on the railroads in the different portions of the United States with a view to ascertaining what, if any, rearrangements or changes in the methods of operation could be effected so as to make it practical and economical to operate continuously at a speed of 12½ miles per hour. These studies have developed that it is not feasible to make such changes, except by expenditures which are absolutely prohibitive and which are far in excess of the cost which would be incurred by changing from a 10-hour to an 8-hour basis of operation. That is, the interest on the investment would be more than the amount required to pay the increased cost of operation.
>
> The investigations we have made into possible revision of services and charges in operating methods have convinced us that a revision of the present pay schedules on the basis proposed could have no other result than corresponding increases to the employees" (Senate Hearing, p. 84).

Therefore in addition to the established factors which must convince the court that there is no ground for declaring that the 12½ mile speed basis has a direct tendency to shorten hours, we have the declarations of the labor leaders that such speed basis will not have any such tendency without punitive overtime (which the Act did not provide) and the representative of the railroads declaring that even with punitive overtime the Act would not have that result.

## III.

But Section 1 cannot be construed as putting into effect the 12½-mile speed basis which, *but only in service other than passenger*, the employees demanded. The wide difference in the language employed makes this perfectly clear.

We state in parallel columns the language of the demand of the employees and the language of Section 1 of the Act.

| Demand of the Employees. | Language of Section 1. |
|---|---|
| Article 1. *(a)* in all road service 100 miles or less, eight hours or less, will constitute a day, except in passenger service. Miles in excess of 100 will be paid for at the same rate per mile.<br>*(b)* On runs of 100 miles or less overtime will begin at the expiration of eight hours.<br>*(c)* On runs of over 100 miles overtime shall begin when the time on duty exceeds the miles run divided by 12½ miles per hour.<br>*(d)* All overtime to be computed on the minute basis and paid for at time and one-half times the *pro rata* rate.<br>*(e)* No one shall receive less for eight hours or 100 miles than they now receive for a minimum day or 100 miles for the class of engine used or for services performed.<br>*(f)* Time will be computed continuously from time required for duty until release from duty and responsibility at end of day or run.<br>(Transcript, p. 17). | "That beginning January 1, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad * * * and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads. * * *" |

The demand of the employees expressly excluded passenger service, but the statute expressly includes passenger service.

In the demand of the employees the mileage unit was the primary unit proposed and that was in accordance with the usual practice. But in the statute there is no reference whatever to a mileage unit or to mileage in any sense whatever in connection with the work or the compensation.

According to the demand of the employees, in the case of runs of over 100 miles (and the record shows that runs generally exceed 100 miles, transcript, p. 5), overtime was not to begin at the expiration of eight hours, but was to begin only "when the time on duty exceeds the miles run divided by 12½ miles per hour." But the statute applies the same eight hour standard work day to runs of over 100 miles that it applies to runs of 100 miles or less; and the statute makes no reference whatever to speed, although the speed basis of 12½ miles per hour is the distinguishing feature of the demand of the employees.

According to the demands of the employees, the establishment, (where not now in existence) and the maintenance of a rate of pay per 100 miles constituted the foundation of the plan; but Section 1 does not require the establishment of a mileage unit of 100 miles in the vast number of cases where not now in effect, and does not prohibit the abandonment or modification of the mileage unit of 100 miles where now in effect.

Furthermore, Section 3, which provides for the amount of wages, and for the method of computing overtime during the temporary period covered, expressly provides that the overtime shall be computed on the basis of eight hours, no matter what the length of the division, whereas the demand of the Brotherhoods contemplated that overtime should be paid only when the mileage, divided by 12½, was exceeded by the number of hours on duty. For example, on a run of 125 miles no overtime would be computed, according to the demand of the Brotherhoods, until after the expiration of 10 hours; but, according to Section 3, overtime would be computed after the expiration of eight hours.

The Adamson Act shows that, whatever rule for measuring compensation is established, that rule was designed to be universal; it was to be used "for the purpose of reckoning com-

pensation for services of *all* employees who are now or may hereafter be employed by any common carrier by railroad," etc. Therefore the Act cannot be restricted in its application to those cases where at present the mileage unit of pay is 100 miles and the equivalent hour unit is 10 hours, but the Act must equally apply to every other existing theory or method of reckoning compensation.

It is impossible therefore to evolve from the language of the Act any theory that Congress intended to prescribe a 12½ miles speed basis. Moreover, if it were possible, to evolve such theory, the result would be in numerous important cases to reduce the existing speed basis, because Section 1 is absolute in its character and could not be construed as expressing simply a purpose to prescribe a *minimum* speed basis. For example, a passenger engineer may be paid on the basis of a rate per 100 miles, with overtime after 5 hours; if section 1 means "100 miles or less, 8 hours or less", then 8 hours must be substituted for 5, so as to reduce this engineer's speed basis to 12½ miles per hour. A freight conductor may be paid on the basis of a rate per 100 miles, with overtime for delay beyond the schedule time of his train. If the time-table speed of his train is 15 hours, he thus has a 15 hour speed basis; but, if section 1 means "100 miles or less, 8 hours or less", this employee's speed basis will be reduced to 12½ miles per hour. Section 1 contains no saving clause, as did Article 4 of the demands of the employees, whereby they are to retain any more favorable rates or conditions than were specified in their demand "100 miles or less, 8 hours or less".

Section 1 cannot be construed as establishing the 12½ mile speed basis without an entire disregard of the language used and the substitution therefor of entirely different language on the theory that Congress meant to say something other than what it did say.

IV.

If it be said that, even if the Act does establish an exclusive eight hour standard which must supersede all mileage standards and all other standards for reckoning compensation, the Act still has a tendency to shorten the hours of train service and must be upheld on that ground, the answers given under I. and II. are equally applicable. There is the further answer that the 8 hour standard prescribed by Section 1 would have an even more remote tendency to influence a speeding up of trains than would the 12½ mile basis, which was sought by the employees. The 8 hour standard prescribed by Section 1 is applicable to any length of operating division. Whenever the division is in excess of 100 miles, the 8 hour standard would make a speed basis of more than 12½ miles per hour. For example, if the division is 128 miles long, the 8 hour standard represents a speed basis of 16 miles per hour. It would not be seriously claimed that on divisions materially in excess of 100 miles there would be any hope of accomplishing a trip within the 8 hours. Since it would be even more difficult to avoid overtime after eight hours than to avoid it on a 12½ mile speed basis, Section 1 would have even less practical effect in shortening hours than the demand of the employees would.

V.

Great doubt arises as to the meaning of Section I. It may be construed to be purely permissive, applying only to contracts providing for pay by the day where the contracts are silent as to the amount of the day's work; or, if regarded as mandatory at all, may be regarded as applying only to future contracts; or, if regarded as mandatory and applying to existing contracts, may be regarded as applying only to con-

tracts providing for pay by the day, leaving the parties free from the control of the statute in the cases of all other sorts of contracts now existing or hereafter made ; or it may be regarded as mandatory and applying to all train service employees, regardless of their present contracts or present methods of compensation. Whatever construction may be adopted, the conclusion is clear that if the section has any mandatory operation it cannot be said that its direct and primary object is to shorten the hours of service and that its interference with the freedom of contract is only incidental to that object; in other words, that the interference with contracts is merely incidental to a constitutional purpose in respect of which Congress has prescribed a rule of conduct. The situation is just the opposite : the direct and primary purpose of Section 1 is the unconstitutional purpose of interfering with the freedom of contract and if there arises any tendency to shorten hours of service, that tendency is not only a mere incident to that unconstitutional purpose, but it is altogether accidental and highly speculative and subject to be defeated by the option which the parties have to pursue the course which will not shorten the hours of service.

## The Scope of the Constitutional Inquiry.

I.

In order for the court to hold that the act is within the commerce power of Congress, it will be necessary for the court to see that the provisions have a substantial relation to some purpose which is within the commerce power of Congress.

> " Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated " (Adair vs. United States, 208 U. S., 161, 178).
>
> The particulars in which the relation between common carriers by railroad and their employees may be regulated by Congress " must have a real and substantial connection with the interstate commerce in which the carriers and their employees are engaged " (Second Employers Liability Cases, 223 U. S., 1, 49).

In passing upon this question it is necessary for the court to determine the purpose of the statute from the natural and legal effect of the language employed in the statute.

> " The motives of the legislators, considered as the purposes they had in view, would always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments." (Soon Hing vs. Crowley, 113 U. S., 703, 710).
>
> " The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into opera-

tion, and not from their proclaimed purpose." (Lochner vs. New York, 198 U. S., 45, 64).

"In Henderson, &c., v. New York, &c., 92 U. S., 259, 268, where a statute of New York imposing burdensome and almost impossible conditions on the landing of passengers from vessels employed in foreign commerce, was held to be unconstitutional and void as a regulation of such commerce, the court said that 'in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." (Minnesota v. Barber, 136 U. S., 313, 319).

## II.

Even though the court could find from the statute that Congress was proceeding to effectuate some purpose within its commerce power and that the provisions of the statute had a substantial relation to that purpose, no provision could be upheld which violated the Fifth Amendment of the Constitution.

The power to regulate commerce among the States "although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution" (Champion v. Ames—Lottery Case—188 U. S., 321, 362).

This power, like the others granted by the Constitution, "is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, * * * " (Monongahela Navigation Co. v. United States, 148 U. S., 312, 336).

"The power, however, does not carry with it the right to destroy or impair those limitations and guarantees which are also placed in the Constitution or in any of the amendments to that instrument", citing Monongahela Navigation case, *supra*, and Interstate Commerce Commission v. Brimson, 154 U. S., 447, 479 (United States v. Joint Traffic Association, 171 U. S., 305 571).

The doctrine that Congress has a wide choice of means in giving effect to its constitutional powers does not mean, of course, that Congress has the right to choose a means which violates the Fifth Amendment. The necessity for this doctrine arose when the right of Congress to adopt a particular means was challenged on the ground that the means adopted involved the exercise of a power not delegated to Congress, but reserved to the States. Thus, in McCulloch vs. State of Maryland, 4 Wheaton, 316, the congressional power to incorporate a bank was challenged, and the court said:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional" (p. 421).

Manifestly Congress has no wider choice of means to accomplish a constitutional purpose than any State legislature would have, for both would be subject to constitutional limitations.

III.

The Second Employers' Liability Cases, 223 U. S., 1, will emphasize the distinction between Propositions I. and II., *supra*. In those cases, the controversy was directed principally to the question whether, on the one hand, the power to regulate the liability of the master to the servant, a matter which had always been a subject of state action, was beyond the powers delegated to Congress and was reserved to the States, or, on the other hand, could be resorted to by Congress as a means to promote commerce among the states. In other words, the principal controversy related to Proposition I. *supra*, and the Court upheld the action of Congress because "the natural tendency of the changes described" (in liability of carriers

to their employees) " is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines ; and, as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making these changes Congress acted within the limits of the discretion confided to it by the Constitution " (p. 51).

The questions raised as to possible violation of the Fifth Amendment were purely subordinate and readily disposed of. The change in rules of liability did not affect property rights, because " a person has no property, no vested interest, in any rule of the common law " (p. 50). The only other points arising under the Fifth Amendment were whether Congress could declare void a contract evading the liability imposed, and whether Congress had the right to make the classification used in the statute. The Court found no difficulty in answering these questions in the affirmative (p. 52).

## IV.

Hence the inquiry must be : (*a*) what purpose can the court deduce from the Act itself as the purpose which Congress was endeavoring to put into effect ; (*b*) is that purpose a regulation of commerce among the States ; (*c*) has the provision under consideration a substantial relation to that purpose ; (*d*) does that provision transcend the limitations of the Fifth Amendment.

## SECTION 3 OF THE ADAMSON ACT, EVEN IF SUSCEPTIBLE OF THE CONSTRUCTION ASSUMED BY ITS ADVOCATES, IS UNCONSTITUTIONAL BECAUSE IT IS NOT A REGULATION OF COMMERCE AMONG THE STATES AND VIOLATES THE FIFTH AMENDMENT.

Section 3 of the Act will be dealt with first so as to simplify and clarify the discussion. Section 3 reads as follows :

> "That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the *pro rata* rate for such standard eight-hour workday."

In dealing with Section 3, the court is confronted with the difficult question as to what Section 3 means when it provides that the compensation of the employees "for a standard eight hour work day shall not be reduced below the present standard day's wage". One of our contentions is that the statute does not supply any definition of what is the present standard day's wage and hence that the section is void for that deficiency. But in order to present fully the broader constitutional objections to the section, we shall first assume for the sake of argument that this provision has the meaning which appears to be attributed to it by its advocates.

The theory of these advocates is understood to be that on September 3rd and 5th, 1916, there was a standard day of ten hours and employees received a standard day's wage for such standard ten hour work day, and that not less than this wage must be paid under Section 3 for the first eight hours of work

and that additional pay must be made *pro rata* on the same basis for additional hours of work; *e. g.*, a locomotive engineer received a standard day's wage of $5.00 for a standard ten hour day and therefore under Section 3 he must be paid not less than $5.00 for the first eight hours of his work and not less than $1.25 additional for the other two hours of his work, making a minimum payment of $6.25 under Section 3 for the ten hours work for which on September 3rd and 5th he was receiving only $5.00. This theory means that in every such case Section 3 compels the payment of an existing wage for 20% less time, and, in every case where the employee works ten hours or more, compels an actual increase of 25% in the money paid him. We contend that with this meaning Section 3 is unconstitutional. The argument as to unconstitutionality will apply in all respects with as much force, and in some respects with greater force, if any less definite meaning be attributed to Section 3.

It will be convenient to point out here some propositions which are believed to be self-evident.

## I.

The Court can deduce from the Act itself no purpose except the purpose to control two features of the contracts between the railroads and their train service employees, the first feature being the standard by which compensation shall be reckoned, and the second being the amount of compensation itself. These matters are not in themselves interstate commerce or instrumentalities of such commerce, but are incidents which are *per se* beyond the power of Congress.

In Hooper vs. California, 155 U. S., 648, the court held that State legislation regulating the insurance of a vessel engaged in foreign commerce was not a regulation of such commerce and indicated that the real distinction between matters within and matters without the commerce power of

Congress "consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other," and indicated that the power to regulate commerce among the States did not extend to all the contracts which might be made in the course of its transaction. The Second Employers' Liability Case, 223 U. S., 1, is not authority for the position that Congress has power to regulate the master-and-servant relationship *per se* in all its aspects between railroad companies and their trainmen. That case held on that point that the mere fact that the matter of liability was a feature of master-and-servant relationship did not deprive Congress of the power to regulate that liability when such regulation had a substantial tendency to promote the safety of interstate transportation.

II.

Not only does the Act fail to disclose any purpose to regulate commerce among the States, but the things which the Act prescribes have no apparent substantial relationship to any conceivable purpose to regulate commerce among the States. The absence of any such relationship to a policy of shorter hours, and also the absence of any declaration by Congress in favor of any such policy, have already been pointed out. In any event, Section 3 which we are now considering has no substantial relationship to any purpose or policy declared or not declared by the statute for the regulation of commerce among the States. A regulation of the amount of compensation which the railroad company shall pay its employee for his services can have no more relationship to any purpose to regulate commerce among the States than a regulation as to the price the railroad company shall pay for its locomotives, rails, cross ties or fuel or other supplies.

The amount of wages which shall be paid an employee is not on principle any more closely related to interstate com-

merce than is his membership or non-membership in the labor organization which controls his actions as an employee. In the Adair Case, *supra*, the court held that "such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services." The provision the court condemned (a provision prohibiting a railroad company from discharging an employee because of his membership in a labor organization) did have some possibility of relationship to the general legislative scheme, of which that provision was a part; and that legislative scheme evinced a clearly constitutional purpose and a clearly constitutional method of accomplishing that purpose, to wit: the purpose to avoid strikes through a plan for voluntary arbitration. But here there is not even a constitutional purpose evinced in any part of the statute.

## III.

Section 3 is an extreme interference with the liberty of contract.

> "The liberty mentioned in that amendment" (Fourteenth Amendment) "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned" (Allgeyer v. Louisiana, 165 U. S., 578, 589).
>
> "Such liberty and right" (*i. e.*, guaranteed by the Fifth Amendment) "embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor" (Adair Case, 208 U. S., 161, 172).

The contract between a common carrier and its employees is a contract whereby the employee, on the one side, agrees to render service and the common carrier, on the other side, agrees to pay a certain sum for that service. The amount which the common carrier is to pay is from its standpoint the very essence of the contract. By Section 3 Congress steps in and prescribes this essential thing and thereby itself makes the very heart of the contract, so far as the carrier is concerned. This interference is wholly different from the interferences which have been upheld as legitimate because merely incidental and because reasonably necessary to the accomplishment of a constitutional purpose.

For example, the "Anti-Coal-Screen Statute," which was upheld in 211 U. S., 539, merely fixed a basis for measuring wages, but left the employer free as to the essential thing, the amount of wages which he would be willing to pay. Likewise, the statute prohibiting the payment of wages in store orders, which was upheld in Knoxville Iron Co. vs. Harbison, 183 U. S., 13, merely prohibited a particular method which was deemed unfair and oppressive, but left the employer free as to the essential thing—the amount of wages which he was willing to pay. The same observation applies to statutes requiring the semi-monthly pay day (See Erie R. R. Co. vs. Williams, 233 U. S., 685). All these statutes interfere with mere incidents and do not touch the essential thing, *i. e.*, the amount of wages. Section 3 does not deal with any incident, but with the essential thing; Section 3 not merely interferes, but it usurps the place of the employer by determining what the employer is to pay and completely deprives the employer of any liberty of contract concerning the very vitals of the contract.

On the other hand, the statutory provision condemned as unconstitutional in Adair vs. United States, 208 U. S., 161, was far less of an interference with the liberty of

contract than is Section 3 of the Adamson Act. The section condemned in the Adair case left the carrier entirely free as to the essence of the contract, *i. e.*, the amount it would pay for services, and restricted the carrier's liberty only in a particular respect, to wit, in its freedom to decide to terminate its contract for the reason that the employee belonged to a labor union.

IV.

On its face, Section 3 is for the direct pecuniary benefit of a particular class of a community, to wit, the persons who are actually engaged in the operation of railroad trains. On its face, it is open to the criticism expressed in Colon vs. Lisk, 153 N. Y., 188 (involving statute providing for forfeiture of a vessel used by one person in interfering with oysters of another), that it was "not intended for the protection of the public" but "was to regulate private interests;" and on its face it fails to come up to the standard expressed in Lawton vs. Steel, 152 U. S., 133, that it must appear "that the interests of the public generally as distinguished from a particular class require such interference."

V.

Section 3 is a direct taking of the carrier's property without compensation and the transfer of the same to private individuals. To take a simple case, assume that in the first six months of 1917 an engineer would work ten hours a day for 150 days and would be paid six dollars for each of such periods of ten hours. The total amount of his payment for the 150 days in the six months would be $900. But Section 3 declares that for this same work the carrier must pay to that engineer 25% more, or $1,125. This means that Section 3 commands the carrier to take a portion of its property, to wit: $225 in money and deliver the same to the engineer, a private individual, for his private use. In this respect also Section 3 is

much more objectionable, from a constitutional standpoint, than was the section condemned by this court in the Adair Case, *supra*, because in that case there was no appropriation whatever of the property of the railroad company to the benefit of the employee.

The appropriation without compensation of the property of one for the benefit of another has been frequently condemned. Loan Association vs. Topeka, 20 Wall., 655. See, also, Chicago, M. & St. P. Ry. Co. vs. Wisconsin, 238 U. S., 491, condemning requirement that occupant of lower berth be given, without compensation, enjoyment of space of upper berth when not actually being used by another; Missouri Pacific Ry Co. vs. Nebraska, 164 U. S., 403, condemning requirement that grant of land be made for erection of private elevator. Such appropriation is condemned even when used as a means to accomplish a constitutional purpose. See Great Northern Ry. Co. vs. Minnesota, 238 U. S., 340, condemning requirement for installation of scales for convenience of shippers to avoid unjust discrimination; Missouri Pacific Ry. Co. vs. Nebraska, 217 U. S., 196, condemning requirement, made with a view to preventing unjust discrimination, that switches be put in at railroad expense for elevator owner; Sweet vs. Rechel, 159 U. S., 380, 398, where it was indicated that marsh land, even if a menace to the public health, could not be appropriated and made the property of the municipality without making compensation, although the municipality, if it had not appropriated the land, might, in the exercise of the police power, have dealt with it in the public interest in such manner as to interfere with the owner's enjoyment thereof.

Neither Section 3 nor any other part of the statute makes any provision for compensating the railways for the property thus taken from them. Whatever the purpose of Section 3, it is plain that that purpose is to be accomplished solely at the expense of the railways without provision for reimbursement.

VI.

For extent of interference with the liberty of contract, appropriation of property without compensation, and legislation for the direct benefit of one class of the community at the direct expense of another class of the community, Section 3 presents a condition far more extreme than is presented by any legislative provision which has been upheld or than is presented by many which have been condemned as unconstitutional.

And all these extreme characteristics are possessed by a statute which does not show any clearly constitutional purpose, and which discloses only the purpose to do these arbitrary and unjust things.

**Section 3 Cannot Be Upheld on the Ground that its Object Was to Avert the Strike, that it Has a Substantial Relation to that Object, and that the Interference With the Liberty of Contract and the Appropriation of Property Without Compensation to the Benefit of the Employees are Under Such Circumstances Permissible.**

If the contention be made that Section 3 is sustainable on the ground stated in this heading, the answers to the contention are clear.

To come at once to the broadest aspects of this contention, we postpone for the moment the proposition that the Act does not purport to avoid the strike and, in the eye of the law, cannot be regarded as having any relation to the avoidance of the strike.

While the averting of railroad strikes is clearly a legitimate object for Congressional action, such an object, no matter how

imminent or widespread the threatened strike may be, cannot be appropriately accomplished by destroying the liberty of contract of the common carrier, or taking its property and giving it to another without provision for compensating the carrier.

Before discussing this proposition, let us face the real meaning of the contention that it is appropriate for Congress to avoid a strike of train service employees by requiring the common carrier to pay them such additional wages as they insist upon having as a price for not striking. If Congress has such a power, then it is for Congress to decide when and to what extent that power shall be exercised. If such a power exists when a nation-wide strike is imminent, it exists equally when a strike is imminent in a single section of the country or a single railroad is threatened. If such a power exists three days before a strike is to begin, the power exists at any time prior to the beginning of the strike, when Congress believes there is danger of a strike. If such a power exists after a strike is called, it exists if Congress believes that a strike is likely to be called. If such a power exists to specify what additional wages the carrier shall pay in order to avert the strike, the power equally exists to specify any other act which the carrier might have to do in order to satisfy the demands of the employees and avert the strike. If, therefore, this principle exists, it seems that Congress has the right, whenever it sees fit to exercise it, to intervene in any actual or any threatened dispute between a common carrier and its employees and to require the common carrier to do at its own expense whatever the employees shall demand. It is nothing less than this broad power which may be invoked to sustain this section as an appropriate means of averting the strike.

It is insisted that the power does not exist, that Congress cannot make a railroad company give up the very essence of its liberty of contract for such a purpose; and cannot compel

the company to deliver a large part of its property to its employes for such a purpose without provision for compensating the Company.

If it be said that Congress was confronted with a public danger and had the right in the public interest to avert that danger, the answer is that even if Congress had the right (which is questioned), to devote even public funds to the satisfaction of private demands, Congress certainly has not the right to avert a public danger through payments to private individuals *and* to require the persons who own the railroads to make those payments at their own expense.

If a case could be imagined where Congress would be without power to prevent in a normal way a threatened injury to the public and therefore would be compelled to use arbitrary means to protect the public, then those means would have to be employed at public and not at private expense.

There is no analogy between an effort on the part of Congress to avert a strike at the expense of the railroad companies by appropriating a part of their property to the benefit of the employees, and the common law principle that under the law of necessity a building in the path of a conflagration can be torn down, in order to avert the further spread of the conflagration, without compensation to its owner. For a discussion of the latter doctrine see Freund on Police Power, pp. 563, 565, paragraphs 534 and 535. Freund indicates that in the face of overriding necessity any individual, whether a public officer or not, may destroy a building to prevent the spread of a conflagration, but only the strictest necessity will excuse it. He also points out that legislatures do not authorize and regulate such destruction without making provision for compensation. But apart from all other distinctions a complete distinction is that when property is destroyed to prevent the spread of a conflagration, it is in fact destroyed and is not transferred to, and enjoyed by, other persons than its owner. *No case can be found where the property of*

*one was transferred to another merely to appease that other and prevent him from committing an injury or doing harm to the community* and that is what Section 3 would accomplish if it were to be justified on the ground that it was passed to avert the strike.

It is not probable that the view will be seriously urged that in any crisis of the character which confronted the country between August 29th and September 2nd Congress has a constitutional power which is different from and greater than the constitutional power which it ordinarily has. One obvious answer to any such suggestion would be that, according to such a principle, Congress could enlarge its powers at will by simply postponing its dealing with a matter until it had reached a dangerous crisis. Another answer is that Congress and not the Courts would in practice be the judge as to when the crisis existed; so that if such a power be conceded constitutional limitations will cease to have a meaning. But if such a view should be urged, it is sufficiently answered by what the Supreme Court said in the Milligan case, 4 Wall. (U. S,), 2:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it; which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority" (p. 120).

But we repeat that in the eye of the law neither Section 3, nor the statute as a whole, averted the strike or had any

legal relation thereto. The legislative purpose must be deduced from the natural and legal effect of the language employed. (See *supra*, p. 38.) The Act did not purport to deal with the strike. Moreover, it left every employee as free as he was before, acting either individually or through a conspiracy or combination with other employees, to stop work and tie up the railroads. The averting of the strike was due to the order issued by the four brotherhood chiefs, calling off the strike. The only connection which that action had with this Act of Congress was that it followed this Act of Congress and appeared to be the result of a tacit understanding that if Congress would pass this Act the brotherhood chiefs would call off the strike. Thus the action of Congress which had a relation to the calling off of the strike was this action in acquiescing in and in carrying out this tacit understanding.

Hence if Congress was regulating commerce by preventing the strike, it was doing so by a process other than the process of legislation constitutionally expressed and adopted. It is submitted any such procedure is lacking in the very essence of due process of law. Congress cannot regulate commerce among the States by entering into an extra-constitutional arrangement with the Labor Unions to avoid a strike, and then, as a consideration to the Labor Unions for carrying out this arrangement, enact legislation, which is not in itself a prevention of the strike and which has no legal relation to that end.

Therefore the history leading up to this Act cannot be invoked to show that Congress by means of an extraconstitutional understanding with the Labor Unions succeeded, by virtue of this Act, in doing something which the Act itself does not purport to do, *i. e.*, averting the strike.

Indeed, the only effect of a consideration of the history leading up to this legislation is to confirm the view that in the eye of the law the legislation is an interference with the liberty of

contract and an appropriation of the property of one to the use of another. The Labor Unions were trying to get the railroads to change the contracts and pay the employees more money. The railroads declined to do this in the absence of arbitration. The Labor Unions threatened to strike. The railroads declined to yield to the threat of the strike. Congress thereupon sought to make the railroads modify their contracts and pay the employees more money. It was an effort by Congress to substitute its action for the contracting function of the railroads and to compel the railroads to transfer a portion of their property to the employees when the railroads otherwise were unwilling to do so. In other words, Congress tried (though in a manner very different from that specified in the demands of the Labor Unions), to modify the contracts so as to give the employees more money and did this in an Act which did not purport to prevent the strike or to relate in any way to the regulation of commerce among the States. The history of the legislation merely confirms the view that in the eye of the law the statute is not a regulation of commerce among the States and is an extreme violation of the Fifth Amendment.

## Section 3 Cannot be Sustained on the Ground that Congress has the Power to Provide Methods for Settling Controversies Between Railroad Companies and Their Train-Service Employees and that Section 3 is an Appropriate Means of Settlement.

If the contention expressed in the above heading be urged, it must rest upon the proposition that in order to settle such controversies and thereby avoid a stoppage of interstate transportation, Congress may provide reasonable machinery for determining upon a reasonable settlement when the parties to such controversy cannot agree, and for putting that settle-

ment into effect; and that Congress, instead of referring such settlement to any other tribunal, may make such settlement itself. In other words, this contention means that Congress has the constitutional power to impose compulsory arbitration which shall be binding upon the employees as well as upon the railroad companies. The existence of any such power in Congress is strenuously denied in many quarters, but a decision of the question in this case appears unnecessary, because what Congress has done differs in two vital respects from what it could do under any such power to compel a settlement of labor controversy affecting interstate transportation.

In the first place, a settlement in advance of hearing would be a method so arbitrary as to be beyond the power of Congress. If the Adamson Act could be regarded as a settlement of a labor controversy, the court knows that such settlement was made in advance of, or without, any hearing on the merits of the controversy. The President's message shows that the employees "absolutely declined arbitration," that the railway managers took the position that they must "stand firm for the principle of arbitration which the men had rejected" and that the President undertook to settle the matter because "there was no means of obtaining arbitration." Congress, recognizing that there had been no investigation of the merits of the controversy, provided by Section 2 of the Act, for the appointment of a Commission "which shall observe the operation and effects of the institution of the eight hour standard work day as above defined, and the facts and conditions affecting the relations between such common carriers and employees." It is clear that, without any hearing on the merits of the proposal made in favor of increased wages, and in the face of the refusal of the employees to permit the hearing of that question upon its merits by any sort of tribunal whatever, Congress attempted by Section 3 to make a grant of increased wages which would appease the employees, and provided for a subsequent investiga-

tion, but made no provision for reimbursing the railroad companies if the investigation should show that the increases in wages sought to be granted by Section 3 were unreasonable under all the circumstances. Such a method of "settlement" with investigation afterwards and not before, is not an appropriate means for the exercise of the power, if Congress possesses it, to enforce a settlement of such controversies, but, on the contrary, is arbitrary and is lacking in the fundamentals of due process of law.

But, in the second place, neither Section 3 nor the statute as a whole can be regarded as a "settlement" of the controversy in any sense of the term, because the so-called "settlement" is binding on only one party to the controversy. Section 3 is not binding upon the employees at all. They are as free, acting either individually or in concert, to reject the increased wages supposed to be provided by Section 3, and to stop work and tie up transportation on any date they see fit, as they were before Section 3 was passed. Even if Congress has power to enforce settlements of such controversies, it has not the power, acting either directly or through any other tribunal, to make a "settlement" of such controversy binding on one party and leaving the other party free to reject such "settlement" either in whole or in part at any time.

Such a "settlement" binding on one party and not binding at all upon the other party, destroys all equality of right. In the Adair case (208 U. S., 161) the necessity for respecting equality of right in employer and employee was emphasized as follows:

> "The right of a person to sell his labor upon such terms as he deems proper is in its essence the same as right of toe purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer for whatever reason

is the same as the right of the employer for whatever reason to dispense with the services of such employee * * * In all such particulars the employer and employee have equality of right and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land". (p. 174).

If it should be said that in a practical sense the alleged settlement was binding upon the employees, because their leaders undertook that they would accept it and because it is a matter of common belief that the employees will in fact stand by it, such an argument would lose sight of the fact that under the Constitution of the United States rules of action prescribed under the commerce power of Congress are to derive their force from acts of Congress passed in accordance with the Constitution and not from resolutions adopted by meetings of union labor and not from intentions attributed to members of labor organizations.

This whole proposition of a power in Congress to impose compulsory arbitration upon the parties involves an interference with liberty of contract and a transfer of property from one party to the private benefit of another, to such an extent as to go far beyond anything which this court has approved. It would seem to be time enough to consider such a proposition when Congress shall have provided a method of compulsory arbitration whereby a settlement shall be made after hearing and not before, and whereby the settlement shall be binding on both parties.

**Section 3 Cannot be Sustained by any Argument That Its Object Is to Prevent Unsafe or Inefficient Railroad Operation as a Result of Wages Which are Too Low, That Congress Has the Power to Accomplish That Object Through Raising Wages, and That Section 3 Is an Appropriate Means to Accomplish That Object.**

The court knows from the statute itself and from its history that it did not have the object mentioned in the heading and we shall show below that Section 3 represents no legislative judgment that what it attempts to require is appropriate to such an object. But before discussing those matters we shall first discuss the general question whether Congress has a power to raise wages for such an object.

It is assumed that Congress as a part of its power to regulate commerce has the power to take steps (provided they do not violate the Fifth Amendment), which may have a substantial relation to the avoidance of unsafe or inefficient railroad operation and to the promotion of safe and efficient railroad operation. To that end it is assumed that Congress could within reasonable limits prescribe proper tests for railroad employees and prohibit the railroad company from employing employees not possessing the necessary qualifications, and could reasonably limit their hours of service and perhaps in other ways, through legislation dealing directly with the characteristics or activities of the employees, could seek to promote safe and efficient operation. Under any such regulations it would be incumbent upon the railroad companies to pay whatever was necessary to get employees of the required sort.

But we deny that Congress can go further and require the railroads to increase the pay of their employees on the theory that higher pay will produce greater efficiency and safety. If

any such power resides in Congress, then on the same principle Congress could prescribe not only the soundness of locomotives, rails, fuel or lumber or other supplies and materials necessary to safe and efficient operation, but could also prescribe the prices to be paid therefor. The assumption of any such power in Congress opens up a field of unlimited interference with the right of private management of privately owned railroad property. If Congress can say "in our judgment an engineer getting $6.25 for a trip of 125 miles would render more efficient or safer service if he were paid $7.75 for that run," this involves on the one hand a fanciful assumption which has no substantial relation to the promotion of commerce among the States, and on the other hand an unlimited interference with liberty of contract and an unvarnished taking of the property of the railroad company and an appropriation thereof to the private enjoyment of the employee.

But if it be claimed that the power of Congress, while not having this unlimited operation in any case where Congress might see fit to increase wages or prices, yet does have an operation in abnormal cases where there may be an existing menace to the safe and efficient carrying on of interstate commerce by reason of abnormally low wages, we in the first place still deny the existence of the power, and in the second place deny that there was in this instance any room for its exercise.

Even in such a supposed case of abnormally low wages, the increase in wages would not have a necessary or substantial relation to the increase in safety, but on the other hand its connection with the object would be remote and fanciful, and such increase in wages would not be a proper means to accomplish the object, but primarily and principally would be an unreasonable interference with liberty of contract and a direct transfer of the railroad's property and an appropriation thereof to the private benefit of the employee.

But if such a power did exist in Congress in abnormal

cases, it would be the court's duty to determine whether the case presented admitted of the exercise of the power. Thus a State Legislature has the power in appropriate cases to limit the hours of labor to promote health, but it is a judicial function which the court cannot escape to determine whether a particular attempt to exercise the power falls within or without the limits of the power.

In the exercise of this judicial function the court cannot reach the conclusion that there is any basis for the idea that the wages of railroad trainmen are in general abnormally low or tend to constitute in any sense a menace to safe or efficient railroad operation.

In Lochner v. New York, 198 U. S., 45, in which the court declared unconstitutional a statute prohibiting more than ten hours labor per day in bakeries, the court said:

> "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed" (161).

To paraphrase this doctrine, even if the court should hold that Congress has a power, in the promotion of interstate commerce, to increase wages which are so abnormally low as to threaten the safety or efficiency of interstate transportation, the court would have to declare Section 3 unconstitutional unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the safety or efficiency of interstate transportation if the wages of train operatives generally are not substantially increased.

In exercising this judicial function, the court will find the conditions are far more clear and convincing in this case than in the Lochner case and in fact in this case are indisputable.

In considering this question the court is compelled to look at the general conditions of pay for railroad trainmen and not at exceptional instances, because it is a striking characteristic of Section 3 that it deals with the general situation and does not attempt merely to deal with exceptional or abnormal cases. Section 3, according to the construction contended for by its advocates, deals with every case where a man's pay, no matter how high his rate of pay, is measured by a period of more than eight hours. The section requires the greatest increase on the part of the companies which pay the highest wages and the lowest increase on the part of the companies which pay the lowest wages. It requires the highest increase to the particular employee who gets the highest pay and the lowest increase to the particular employee who gets the lowest pay. The court, therefore, must consider whether the pay of railroad train labor *as a whole* is so abnormally low as to indicate a substantial basis for the assumption that an evil exists which threatens or tends to threaten safe or efficient interstate transportation and which calls for congressional action applying to all railroads and to all classes of train operatives.

Considering this question the court will find that while the railroad business has been the most thoroughly regulated business in the country, the most thoroughly investigated, the most frequently criticised and the most variously commented upon, yet there has never developed a sentiment that the pay of railroad train operatives was abnormally low, generally speaking, or anything but ample, if not abnormally high.

The court knows that no condition of oppression of railroad train labor has existed in this country which would be calculated to produce or admit of abnormally low wages. On

the contrary, the court knows that this train labor is represented by four Brotherhoods which are probably the most powerful labor organizations in the world. The activities of these Brotherhoods for many years have been a matter of common knowledge, and the recent culmination of their power last August calls for no comment. Such a condition certainly raises no presumption that the wages of railroad trainmen generally have been so abnormally low as to endanger safe or efficient operation.

It is a fact shown in the record that the wages of the employees of appellee

> " are and have been substantial, and in many instances high, and that said wages are now higher than they have ever been before."

In February, 1911, the Interstate Commerce Commission in the Eastern Rate Advance Case, 20 I. C. C., 243, said:

> "Comparing 1896 with the present year, nearly all kinds of supplies which enter into the construction, maintenance and operation of a railroad have very much increased in price. Nearly one-half the cost of operation is labor, and it is said that within that period the wages of railroad employees have advanced 30 per cent. We are told that not only has the price of a day's labor increased, but that the efficiency of that labor for various reasons has decreased" (p. 275).
>
> "*Railroad labor, certainly organized railroad labor, is probably as well paid, and some say better paid, than labor of other kinds, upon the average.* Railroad Employees will hardly expect to receive wages which exceed those paid to other forms of labor for the same grade of service, and this Commission certainly could not permit the charging of rates for the purpose of enabling the railroads to pay their laborers extravagant compensation as measured by the general average compensation paid labor in the country as a whole" (p. 278).

In 1914 the Commission in the Five Per Cent. Case, 31 I. C. C., 35, said :

> " Exhibits filed by 30 of the 35 railway systems involved in this proceeding indicate an increase of 9.02 per cent. in the average daily wage paid in 1913 as compared with 1909, and that if the scale of wages for 1909 had been in effect during 1913 the labor costs of the latter year would have been less by about $51,000,000 than they actually were " (p. 379).

In the same opinion the Commission set forth certain tables which showed the following percentage of average daily wages of all employees and the increase therein for the year 1913 as compared with the year 1903 :

| Name of Road. | Average daily wage, all employees. | | Increase. | |
|---|---|---|---|---|
| | 1903. | 1913. | Amt. | Per Cent. |
| Pennsylvania R. R. | $2.06 | $2.78 | $0.72 | 34.95 |
| Baltimore & Ohio R. R. | 2.01 | 2.45 | .44 | 21.89 |
| New York Central & Hudson River R. R. | 2.11 | 2.69 | .58 | 27.49 |
| Norfolk & Western Ry. | 1.85 | 2.55 | .70 | 37.84 |
| Kanawha & Michigan R. R. | 1.90 | 2.62 | .72 | 37.89 |
| Hocking Valley Ry. | 2.04 | 2.41 | .37 | 18.14 |
| Pittsburg & Lake Erie R. R. | 2.07 | 2.73 | .66 | 31.88 |
| Bessemer & Lake Erie R. R. | 2.06 | 2.62 | .56 | 27.18 |

A comparison of the above average daily wages of all employees for the railroads named with the average daily wages of enginemen, firemen, conductors and other trainmen for the years mentioned on the same railroads is not available, but a reference to the average daily wages of these four classes of train service employees for the years named for all railroads is fairly suggestive of the much higher pay of the train service employees, *i. e.*, of organized railroad labor :

Statement showing for all railroads average daily wage of classes of employees named for years ending June 30, 1903, and June 30, 1913:

| Class. | 1903. | 1913. |
|---|---|---|
| Enginemen | $4.01 | $5.20 |
| Firemen | 2.28 | 3.13 |
| Conductors | 3.38 | 4.39 |
| Other Trainmen | 2.17 | 3.04 |

(Interstate Commerce Commission's Statistics of Railways in the United States for 1903 and 1913. The figures for 1913 do not include figures for switching and terminal companies.)

A brief reference to the *rates of pay* shown by the schedules in the record and the other schedules to which we have referred will further emphasize the character of pay of these employees.

In respect of employees paid per 100 miles or less, fairly suggestive rates of pay are as follows:

Engineers are paid per 100 miles or less: In the case of appellees' railroad from $5.20 to $6.15 in freight service and $4.40 in passenger service; and in the case of other railroads from $4.75 to $6.50 in freight service and from $4.25 to $5.90 in passenger service.

Conductors are paid per 100 miles or less: In the case of appellees' railroad $4.18 in freight service; and in the case of other railroads from $4.00 to $4.84 in freight service.

Firemen are paid per 100 miles or less: In the case of appellees' railroad from $3.30 to $4.00 in freight service and $2.45 in passenger service; and on other railroads from $2.75 to $4.25 in freight service and from $2.45 to $4.00 in passenger service.

Brakemen are paid per 100 miles or less: In the case of appellees' railroad $2.78 in freight service; and in the case of other railroads from $2.67 to $3.70 in freight service.

As to the four classes of employees rates in local freight service may be frequently higher, say by from 25 to 40 cents per 100 miles, than in through freight service.

It must be remembered that ordinarily these *rates of pay* are much below the wages actually received. The employee gets additional pay *pro rata* when his run is more than the 100 miles, as is the case to a very large extent; the employee also gets additional pay also if his run is not at the rate of speed guaranteed in the wage schedule; and gets still further pay for various specified delays and for various special services incident to the run. The employees frequently also get additional pay when they work in more than one class of train service in the course of the day.

It is unnecessary to complicate the discussion by referring specifically to the rates of pay, on correspondingly high levels, which are paid to train-service employees of all classes and in all classes of service on other bases, whether per some unit of miles other than 100 miles, or per trip or per month, or otherwise. Such reference would merely emphasize the complete absence of any suggestion of an evil of pay so low as to tend to inefficient or unsafe train operation.

Under such conditions the court could only find, even if it held that in abnormal cases a power resided in Congress to promote efficiency or safety through the increase of wages, that there was nothing to suggest a basis for the exercise of such a power in connection with the conditions which in September, 1916, prevailed in railroad train service. If Congress has a power, on the plea of increasing the efficiency or safety of railroad train service, to raise wages generally when wages already are so far above any level which could be regarded as suggesting a tendency to impair efficiency or safety, it must follow

that Congress, free from any constitutional restraint, may substitute its will for the owners' power to contract and may take the property of those owners and appropriate it to the private use of the employees.

But, while we have dealt with this question of the power of Congress, there appears to be no occasion for the court in this case to consider this question either for the purpose of denying *in toto* any such legislative power, (thereby following practically all the authorities on the subject),* or for the purpose of declaring the existence of such a power and considering its applicability here. This is true for two reasons: first, the court knows Congress was not attempting to exercise such a power, and second, Section 3 cannot be regarded as a legislative judgment upon any such subject. It will be time enough for the Court to deal with this question when Congress shall have undertaken to exercise the power and shall have passed a statute which can be regarded as a legislative judgment that that statute is an appropriate means for accomplishing an object within that power.

There is nothing in the language of this statute to justify any contention that Congress by passing this statute recognized the existence of an evil of abnormally low wages, or any tendency of any such evil to impair the efficiency or safety of

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*The only case in this country which has upheld a statute prescribing wages to be paid by a privately owned business, is Stettler vs. O'Hara (Oregon), 139 Pac,, 743, in which the Supreme Court of Oregon upheld an Act "to protect the lives and health and morals of women and minor workers," and creating a commission and empowering it, when of opinion that women workers "are receiving wages inadequate to supply them with the necessary cost of living and maintain them in good health," to prescribe minimum wages accordingly. All other authority appears opposed to this ultimate interference in the right of the individual to agree as to what wage he will receive, and in the right of a privately owned business to agree as to what it will pay, and opposed to the appropriation of the employer's property to the use of the employe. For leading authorities to this effect, see *Ex parte* Dickey, 114 California, 234; Commonwealth vs. Perry (Mass.). 28 N. E., 1126; Low vs. Rees Printing Company, 41 Nebraska, 127; Wheeling Bridge and Terminal Railway Co. vs. Gilmore, 8 Ohio, Cir. Ct. Rep., 658; Cooley's Constitutional Limitations, p. 870.

interstate transportation, or was seeking to accomplish the removal of any such evil and the consequent promotion of efficiency or safety through prescribing wages which would tend to have such result.

There being a complete absence of anything in the statute to suggest that Congress passed the Act to correct abnormally low wages, so as to promote safe or efficient operation, the court is not called upon to decide that such was the purpose of the Act when such a decision would be in direct conflict with the undisputed historical purpose.

Furthermore, Section 3 does not constitute a legislative judgment that certain wages are appropriate and requisite for the purpose of promoting efficiency or safety. If abnormally low wages for railroad trainmen had been prevalent and had been a menace to the efficiency or safety of interstate transportation, such a condition would have been a continuing condition and a correction thereof would have been a continuing correction. But Section 3 is not a continuing provision. It ceases to have any effect thirty days after a report shall have been made by the Commission of Inquiry to be appointed under Section 2 of the Act. Section 3 cannot be in effect more than eleven months, and may be in effect only a little over seven months. This feature alone shows that Section 3 has no connection with the promotion of safe or efficient operation and hence cannot be regarded as a legislative judgment that any wages therein required or suggested are needed to promote safe or efficient transportion. If Congress believed that safety or efficiency in interstate transportation was menaced by existing wages, it is inconceivable that Congress would correct that matter for a variable period between seven and eleven months in length, would make the termination of the period dependent upon an irrelevant circumstance, and would leave interstate commerce then unprotected against this menace unless and until thereafter affirmative steps should be taken which would materialize in new legislation.

But for other reasons also Section 3 is not a legislative judgment that particular wages are necessary or appropriate in order to promote safe or efficient transportation. The Section does not specify any wages which, in the judgment of Congress, are necessary or appropriate for the purpose in question or for any other purpose. The Section does not attempt to correct any possible abnormal conditions which may exist in exceptional cases. The Section is a blind, arbitrary, blanket increase of whatever wages were paid on September 3 and 5, whether those particular wages were high or low, right or wrong. The Section enforces the greatest increase upon the railroad which takes the most liberal attitude and pays the highest rates of wages, and thereby penalizes that liberality. The Section imposes the lowest increase upon the railroad whose rates of pay are the lowest. It would be inconceivable that all wages paid are exactly correct. In many instances, wages must be unreasonably high, as compared with others, and in some instances wages are probably unreasonably low, as compared with others. But, whatever the disparity, it is intensified by this Act. If the theory be that the higher the wage the greater the efficiency, those employees who happen to have the most unreasonably high wages at the present time would, theoretically, be the most efficient, and yet these are the employees who get the greatest increase; and the employees who get the lowest wages, and who, therefore, according to this theory, are the least efficient, will get the lowest increase.

This record shows:

> "that the rates of wages on one railroad differ, in a great many particulars, from the rates of wages on other railroads of said employees performing similar services.
>
> "That Section 3 of said act, if capable of application, is a merely arbitrary increase in wages, without reference to the question of whether existing wages are high or low, and with respect to any train crew, giving the greatest increase to the employee who now enjoys

> the highest wages and the lowest increase to the employee now receiving the lowest wages" (Transcript, p. 14).

Before dealing with this question of a power in Congress to raise wages to promote the object of safety or efficiency in interstate transportation, the court can well wait until Congress itself shall indicate that it believes it possesses that power and believes a necessity exists for its exercise, and shall express its judgment that the wages specified or indicated by it are appropriate to promote that object.

## Section Three Cannot be Upheld by Analogy to the Rate Making Power.

It may be suggested that Congress has full power to prescribe rates and therefore, by analogy, has power to prescribe wages. The power of Congress to prescribe rates rests upon its power to promote interstate commerce by preventing its obstruction through the imposition of improper rates. If, by analogy, Congress has a similar power with respect to wages, that power also is to prevent the obstruction of commerce through the exaction of improper wages.

But, even if Congress has such power, Section 3 is not an exercise of it. It does not purport to protect the public or interstate commerce against improper wages. On the contrary, it requires a heavy increase in existing wages.

Legislation respecting the amount of wages to be in any sense analogous to rate-fixing legislation, would have to be binding on the person *who makes the charge, i. e.*, the employe. But Section 3 is binding only on the person *who has to pay the charge, i. e.*, the employer.

Doubtless, if the court shall ever take the view that Congress has the power to promote interstate commerce by prescribing proper wages for train service employees, such doctrine would be by a further development of the ideas expressed in German Alliance Co. vs. Lewis, 233 U. S., 389,

where the court held that prices may be fixed for service as well as for the use of property, and that this may be done even where there is no legal obligation upon the person affected to render the service; and that it all depends upon the question whether the rendition of the particular service has become a matter of sufficient public concern to justify a limitation upon the price or compensation which shall be charged. It may be that hereafter, the court will conclude that, on account of the control exercised by the Railroad Brotherhoods over the welfare of the public, and the consequent power which the Brotherhoods have to exact excessive wages for the service which its members perform, Congress has the power to protect the public by restricting the extent of these exactions. But the question does not arise now because Section 3 has no such purpose or effect.

## Section 3 Cannot be Upheld on Any Theory of a Power in Congress to Control Railroad Expenses so as to Promote Reasonable Rates.

It may possibly be contended that the right to fix wages is an incident to the power to fix rates, because reasonable rates are dependent, to some extent, upon expenses not being extravagant.

It would seem that if the power of rate-fixing could be regarded as including control over expenditures, the power would be confined to disallowing any excessive expenditures. The Interstate Commerce Commission has proceeded on the theory that extraordinary or unnecessary cost of operation or management cannot be permitted to cause unreasonable or unjust rates. (Milk Producers Protective Association vs. D. L. & W. R. Co., 7 I C. C. Reports, 92; Society of American Florists vs. United States Express Co., 12 I C. C. Reports, 121).

It could not be held that the power to fix rates gives the power to fix all expenses, without substituting the Government as the manager of the railroads. The existence of such power

would open up a field which this Court in So. Pac. Company vs. Interstate Commerce Commission, 219 U. S., 433, 444, indicated was not open, *i. e.:*

> "a vast field for the exercise of discretion, to the destruction of rights of private property in railroads, and would in effect assert public ownership without any of the responsibilities which ownership would imply."

In Interstate Commerce Commission vs. Chicago Great Western Ry. Co., 209 U. S., 108, it was said:

> "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager" (p. 118).

Certainly the Court is not called upon to affirm that for the object of obtaining reasonable rates Congress has such power of management over the railroads while in private ownership, until Congress shall have expressed a deliberate purpose to exercise such power for that object.

Here the Court knows that Congress did not enact section 3 as an incident to its rate-fixing power, for the purpose of preventing wages being burdensome, because that Section has no tendency to make expenses less burdensome, but, on the contrary, its sole tendency is to make them more burdensome. No purpose to promote reasonableness of rates is expressed by, or can be implied from, the language of section 3.

Moreover, the court knows affirmatively from the Act itself and from its history that it had a different purpose. Indeed, the President's message showed not that the increased wages were proposed in order that reasonable rates might result, but, on the contrary, that increased rates would probably be necessary in order to meet the increased wages. One of the President's recommendations (which Congress did not adopt) was:

> "FOURTH. Explicit approval by the Congress of the consideration by the Interstate Commerce Commission of an increase of freight rates to meet such additional expenditures by the railroads as may have been rendered necessary by the adoption of the eight hour day and which have not been offset by administrative readjustments and economies should the facts disclosed justify the increase" (Transcript, p. 22).

## Section 3 Cannot be Upheld on the Ground that Hereafter the Railroad Companies may be Reimbursed Through Increased Rates or Otherwise for the Deprivation of their Property and its Appropriation to the Private Use of the Employees.

If the argument suggested in the heading shall be urged, it will be sufficiently answered by this court's decision in Chicago, Milwaukee & St. Paul Railway vs. Wisconsin, 238 U. S., 491. In that case the argument was made that even if the statute operated to take the property of the company (to wit: space in its sleeping car not paid for by the passenger), and to give it, without pay, to the passenger, nevertheless the laws of Wisconsin provided a scheme whereby the company could, through the observance of statutory procedure, put in effect such reasonably compensatory rates as might be sanctioned by the Railroad Commission. The court, however, denied this contention and held that where property was taken the compensation made must be coincident with the taking. The Court in this connection said:

> "But if the statute * * * operates to take property, such taking cannot be justified on the ground that the Company may be able to secure an increase in rates. For, without considering any other question involved, it is sufficient to say that this taking and a fixed right to compensation must coincide, though in some cases the time for payment may be delayed" (238 U. S., 500).

**Section 3 Is Unconstitutional Because Not a Legislative Expression of a Regulation Necessary to Promote Commerce, But the Creation of a Temporary Experimental Status to Determine Whether Regulation on Such Lines Will Promote the Public Welfare or Not; and This at the Expense of a Particular Class Without Provision For Reimbursement and Primarily For the Private Benefit of Another Class.**

Section 3 creates merely a temporary status or condition between the railroads and a class of their employees for the purpose of enabling the Commission appointed under Section 2 to observe the effect of the application of Section 3. Upon its face, the Act does not pretend to set forth the judgment of Congress that the regulations in question are necessary or essential for the proper conduct of interstate commerce. The wage regulation provided for in Section Three is to continue only during the period that the Commission is to observe the effects thereof, and was not designed as a regulation of interstate commerce.

The power delegated to Congress to regulate interstate commerce was given to enable Congress to promote such commerce, and, through its regulation, to promote the public welfare, for a constitutional regulation of interstate commerce must, and does, presume such a result (Hoke vs. United States, 227 U. S., 308). Therefore, a law which on its face rebuts such a presumption cannot be a constitutional regulation of interstate commerce. In this case we find a provision enacted in order that its own effect may be observed so as to determine hereafter whether the provision promotes the public welfare or not.

Congress cannot thus venture into a field of experimental regulation to watch the effect, if any, of the experiment upon

the general welfare or even upon interstate commerce. Such a proposition is conspicuously true when the experiment is designedly made at the expense of a specified class of society for whose reimbursement Congress has made no provision and primarily for the private benefit of another class of society.

Such experimental legislation cannot be sustained by analogy to the judicial doctrine that at times legislative rates will not be set aside until experiment has demonstrated their unreasonable character. In such cases, the judicial doctrine rests upon the proposition that the legislature, acting within the scope of its powers, has expressed a legislative judgment as to rates which the judicial branch of the government in doubtful cases ought to respect as reasonable, at least until actual experiment has shown that such rates are unreasonable. This judicial doctrine rests upon the proposition that the legislature has in fact expressed its final and unqualified judgment. If, however, the legislature prescribes certain rates and declares in effect that it does not know whether the rates prescribed are right or wrong, but that they are to be in force for a period of nine months, so that a commission of inquiry may report upon their effect to the legislature, it is clear that the courts would be under no obligation whatever to permit those rates to go into effect on the ground that the legislative judgment ought to stand until experiment shows it is wrong.

A legislative judgment in a constitutional sense presupposes that the legislature, in due form, has decided that a certain rule of action is proper and should be established. When the legislative act shows on its face that the legislature has not reached this conclusion, but has merely reached a conclusion that the matter is worthy of investigation, and for the purpose of an investigation it is desirable to create an experimental status, there is no legislative judgment in the constitutional sense at all, and there is no due process of law.

**Section 3 is not a Regulation of Commerce among the States. Its Primary Object is to Interfere with the Employer's Liberty of Contract to the Advantage of His Employees and to Appropriate His Property to Their Private Use. Its Extreme and Arbitrary Character makes it a Striking Violation of the Fifth Amendment.**

A consideration of Section 3 from all angles demonstrates its failure to come up to any of the tests to which a constitutional statute must conform.

Section 3 cannot be upheld as in itself a regulation of commerce among the States, or as having any substantial relation to any such regulation which can be deduced by the court from any part of the statute. Indeed, Section 3 has no substantial relation to any promotion of such commerce at all.

The court cannot deduce from Section 3, or from the Act as a whole, any purpose to regulate commerce among the States or any purpose whatever except the plain purpose which the Act expresses to prescribe certain conditions of the contracts of employment, including a supposed increase in wages.

This conclusion and no other is deducible from the statute itself and is confirmed by the history of the legislation. The employees were seeking to get more favorable pay and conditions. The employers refused to concede them. After various efforts at mediation, including those of the President, the employees announced that they would strike unless certain demands should be granted which the employers still declined to grant. Thereupon Congress adopted the provisions of Section 3, which at the time of its passage appears to have been supposed by the employees to give what they said they must have as the price for not striking.

Here was a plain exercise by Congress for the benefit of the employees of a contracting function which the employer had refused to exercise.

Thus, the primary object of Section 3 was, for the benefit of the employees, to override the liberty of contract of the employer, and give them an increase in wages which the employer had refused to give.

The case falls clearly within the doctrine expressed by this court in Coppage vs. Kansas, 236 U. S., 1, where the court held unconstitutional a Kansas statute prohibiting a railroad company to require its employees to agree not to join labor unions.

In that case the court said :

> " The Act, as the construction given to it by the State court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upholding of the labor organizations " (236 U. S., 16).
>
> " In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the (Kansas) statute, and not an incident to the advancement of the general welfare " (236 U. S., 18).

Not only do we have a statutory provision made for the primary purpose of interfering with the employer's liberty of contract for the benefit of certain classes of employees, as in the Coppage Case, but we have a statutory provision which actually appropriates the property of the railroad company and transfers it to these employees for their private use, and which does these things in the most extreme and arbitrary manner. If the section can have any effect, it is a blind, blanket increase in wages ; it requires the most liberal railroad to pay the greatest increase, and the least liberal railroad to pay the least increase ; it gives the greatest increase to the employee in slow service with the highest rate of pay and the lowest increase to the

employee in slow service with the lowest rate of pay ; as will be pointed out below, if it can have anything like general application, it gives for the same 8 hours of work a 25 per cent. increase in wages if the employee has a ten-hour overtime limit, but a 50 per cent. increase in wages if the employee has a 12-hour overtime limit, etc. ; and the statute shows on its face that it was passed without investigation of the merits and that such investigation was to follow but without provision for reimbursement ; and, indeed, the statute shows that the increase was provided merely as an experiment for the purposes of observation but solely at the expense of the employers.

All we have said on pages 43-49, *supra*, in describing the characteristics of this statute is confirmed and intensified by the further analysis which we have attempted to make.

The unconstitutional characteristics of Section 3 are far more clear than the provision of the Erdman Act which the court declared unconstitutional in the Adair Case, 208 U. S., 261.

We submit that section 3, if susceptible of a construction that would give it any effect, is unconstitutional because outside the power delegated to Congress and because a violation of the Fifth Amendment of the Constitution.

## SECTION 3 IS VOID FOR ITS FAILURE TO DEFINE A STANDARD OF CONDUCT.

Section 3 reads as follows :

> " That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this act for a standard eight-hour work-day shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such em-

> ployees shall be paid at a rate not less than the *pro rata* for such standard eight-hour work-day" (Transcript, p. 8).

This section prescribes no legal rule of conduct unless "the present standard day's wage" is ascertainable.

The penalties are prescribed by Section 4, which reads as follows:

> "That any person violating any provision of this act shall be guilty of misdemeanor, and upon conviction shall be fined not less than $100.00 and not more than $1,000, or imprisoned not to exceed one year, or both" (Transcript, p. 8).

Apparently the railroad company and one or more of its officers would commit a separate violation for each employee on each pay day (either monthly or semi-monthly) if the statute is valid and enforcible and is not complied with (See M. K. & T. Ry. Co. vs. United States, 231 U. S., 112). Perhaps also each employee who co-operated in bringing about payment on a basis lower than that precribed in the statute would be equally subject to the penalty.

The bill of complaint herein contains the following averment:

> "Complainants further state that by reason of the fact that none of their train service is, or can be, operated upon the basis of a fixed day's labor, and that the wages paid vary according to numerous conditions, which change from day to day, there is no such thing as a 'standard day wage' in railroad service" (Transcript, p. 14).

It is apparent, not only from this admitted allegation, but from the more specific facts alleged in the bill of complaint and admitted, and from the general facts known to the courts, that there is no standard day's wage in railroad service.

The fact is that the train service employee performs his piece of work which is the run to which he is assigned. Each time he performs this piece of work he renders service which in character and extent fluctuates with the unstable conditions under which train service must be performed. On one day he may be delayed on the road; on another delayed at the initial terminal; on another delayed at the final terminal; on another may load or unload material or live-stock; on another may have to "double" in order to get a heavy train over a heavy grade; or any two or more of these conditions, either with or without numerous others, may become a part of his work connected with the trip. His total pay will be influenced by all these conditions, as well as by the primary condition of the length of the run which he makes.

Hence the bill of complaint is evidently correct in its allegation that train service is not and cannot be operated upon the basis of a fixed day's labor, and that the wages vary according to numerous conditions, which change from day to day, and therefore that there is no such thing as a standard day's wage in railroad service.

It may be argued that the history of the Act shows that the purpose of Section 3 was to require, for the period therein prescribed, the payment of a 10 hours' wage for the first eight hours of service. The difficulties with this argument are (*a*) that the Act does not say this and that its failure to say it indicates that such was not the intention—indeed, indicates at least a doubt on the part of Congress as to whether there was a 10 hour wage of universal application; and (*b*) that there is not a 10 hour wage, because primarily wages are based on mileage and, even for the purpose of expressing a speed basis, 10 hours is by no means the universal equivalent of the 100 mile unit (especially when passenger service is considered), and because further, to a large extent 10 hours is not used at all in the numerous cases where the 100 mile unit is not used for reckoning compensation.

But it may be urged that Section 3 should be given the same meaning as paragraph (*e*) of the demand of the employees, which reads as follows:

> "(*e*) No one shall receive less for eight hours or 100 miles than they now receive for a minimum day or 100 miles for the class of engine used or for service performed."

The result of this construction would be to depart from the ordinary idea of a standard day wage as being a wage of general application, and instead to adopt the plan of working out for any employee or class of employees his or its own special rate of pay.

Furthermore, any such contention involves the further doubt as to whether the expression "standard day's wage" as used in Section 3 should be construed as applying only to the rate, say, per 100 miles, and as excluding from application the numerous subsidiary standards for reckoning compensation, such as provisions for allowing additional miles or hours for special delays or special services. For example, a freight conductor may have not only a rate of, say $4.00 for 100 miles or less, with overtime on a 10-mile speed basis, but will have also numerous subsidiary methods for reckoning compensation. He may make a run of 120 miles in 11 hours, but in that 11 hours he may have had an hour's terminal delay and an hour may have been consumed in unloading material. Therefore the conductor, according to the standards for reckoning his compensation, may not only get pay for his 110 miles, but also for two additional hours. Paragraph *(e)* of the demand of the employees certainly had no relation to these subsidiary standards, but the question arises whether Section 3 does or does not relate to these subsidiary standards.

But passing that complication, there is a fundamental difference between a proposition in private negotiations and a penal statute. The private proposition may be and will be

amended as the necessities require, and even if difficulties arise after the proposition is agreed upon, there are no fines or imprisonments for failure to observe the construction of the proposition which the court may subsequently adopt. But the statute must stand, and be enforced as it stands, and the penalties will be imposed accordingly.

The complexities of the wage schedules make it evident that if the railroads had acquiesced in the principle expressed in paragraph (*e*) of the employees' proposition that the pay for the existing "minimum day or 100 miles" should thereafter be paid for the 100 miles on a 12½ mile speed basis, it would have been necessary to make supplemental agreements covering vast numbers of cases which the proposition in its original form did not fit. But Section 3 (if otherwise constitutional) must either be obeyed according to its own language, without amendment as the result of further negotiations and adjustments between the parties, or must be rejected on the ground of uncertainty.

Even if the court were justified in making the effort to introduce certainty into Section 3 by giving it the meaning of paragraph *(e)* of the demand of the employees, the following are some of the impossibilities and uncertainties which will arise:

There are numerous instances where crews of passenger trains have long runs requiring over eight hours; frequently with long lay-overs on other days to compensate. Therefore these employees on the days on which they work, work more than the standard eight hour work day. Yet in many instances, notably in the West in the case of conductors and brakemen, there is no present "standard day's wage" even according to the view that Section 3 means the present minimum day or 100 miles. These conductors and brakemen are paid a monthly salary for a mileage of, say, from 4,000 to 6,000 miles per month, without reference to the number of days on which they work per month and without reference to any given number of

hours' work per day. In all these cases therefore Section 3 fails to prescribe or point to any standard by which it can be enforced.

In a great many cases, especially as to branch line service both passenger and freight, and especially as to local freight service, and also in notable instances (for example, Southern Pacific—Pacific Lines) of other freight service, employees are paid a fixed monthly wage, and are not paid by the day or by the separate trip. Very generally, these employees are paid additional compensation on some agreed basis for overtime after a specified number of hours, frequently, but by no means always, 10 hours. They are not paid for a unit of 100 miles or for any other unit of miles. Apparently as to all these employees there is no "standard day's wage." If it be said that their monthly wages is reducible to a daily wage, it will be obvious that this computation may be made according to various bases; perhaps by dividing the number of working days in a month into the amount of the monthly wage, and in this event the "standard day's wage" will vary according to whether the month has 31, 30 or 28 days, and according to whether there are four or five Sundays in the month. Perhaps the day's wage may be arrived at by an arbitary assumption of 26 working days to the month. Perhaps it may be arrived at by dividing the yearly wage by the number of working days in the year. The statute prescribes no method and hence as to all these cases prescribes no rule of conduct by which the parties may govern their action.

In a great many cases employees are paid a fixed wage per trip which does not rest upon a basic pay per 100 miles or per any other unit of miles. The prescribed time after which overtime begins varies according to the length of the trip and frequently, in the case of trips exceeding 100 miles, is 11 or 12 hours or possibly more. Does Section 3 mean as to all these cases that the "standard day's wage" is the wage for the total trip? If so, it means as to all these cases something

fundamentally different from what it means when the rate of pay is computed on the 100 mile basis. The following illustration is shown by the Pennsylvania schedules (which schedule may, by agreement, be referred to for illustration): Two freight conductors on the same railroad may make trips of 146 miles. One is paid on the basis of 4 cents per mile, with overtime on a 10 mile speed basis, thus producing $5.84 for the trip with overtime at 40 cents per hour after 14 hours and 36 minutes. The other is paid $6.26 for the run from Harrisburg to Renovo, 146 miles, with overtime at 37 cents per hour after 15 hours. According to the view that Section 3 means the same as paragraph (*e*) of the employees' demands, the first conductor's "standard day's wage" might be $4.00 and he might be paid not less than this amount for the first eight hours of his service. But what is the present "standard day's wage" of the second conductor? Apparently there is no standard at all, as he is simply paid a lump sum for the trip. If that were taken as the standard, then he would be paid $6.26 for eight hours as against $4.00 paid to the other conductor. If it be said that this problem is to be met by evolving a constructive rate of pay per 100 miles for the second conductor, then the statute is fatally defective, because it prescribes no rule by which this standard shall be computed. This is a matter which in private negotiation could probably be adjusted. But a statute cannot rest upon private negotiation for the ascertainment of the rule of conduct which must be observed to avoid penalties. No imaginable mathematical rule can be used to obtain an answer to such cases, because the factors involved are not the same. The first conductor has a rate of $4.00 per 100 miles, with overtime on a 10 mile speed basis. The second conductor has a rate which may be regarded as the equivalent of $4.30 per 100 miles, but with overtime provisions equivalent to a $9\frac{1}{13}$ mile speed basis. The fact is that the pay is fixed on a different basis with-

out any necessary reference to common factors, and the basis for one employee is not convertible mathematically into the basis for the other. No such conversion can take place except in view of business considerations which the statute does not define or control.

A similar difficulty arises in a great many instances, especially in branch line service, where overtime is computed sometimes after 10 hours and sometimes after 11 hours or 12 hours. If the overtime limit, no matter what it is, be regarded as the "standard day," then one employee will get for eight hours what in the past he has got for 10 hours, thus meaning a 25 per cent. increase in pay, whereas another employee will get for eight hours what in the past he has got for 12 hours, thus meaning a 50 per cent. increase in pay. Certainly the statute should not be construed to produce such utterly arbitrary results. And yet the statute prescribes no rule whereby such arbitrary results can be avoided.

Even according to the view that Section 3 can be construed to mean the same as paragraph (*e*) of the employees' demands, the statute fails because of its fatally defective character as to great numbers of employees to whom the section must have been intended to have equal application.

So we have again the familiar case of a statutory provision being unconstitutional in an inseparable part. If the Court should be asked to uphold this section and apply it in those cases where there now is a rate per 100 miles, while letting the statute fall in all the other cases where it would obviously be too vague for enforcement, the Court can say, as it said in United States vs. Reese, 92 U. S., 214, 221 : "To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

Any effort to give the section the meaning of paragraph (*e*) of the employees' demands is precluded by the Court's inability to insert in a statute words which it does not contain, and even after the change had been made the statute

would still fail as a whole because of its failure in an inseparable but substantial part. The situation suggests the situation presented in the Employers' Liability Cases, 207 U. S., 463, 500, 501, where the court indicated that it could not "write into the statute words of limitation and restriction not found in it", and that even if such qualifying words were written into the statute, the court "would be but adding to its provisions in order to save it in one aspect, and thereby destroy it in another."

We submit that the correct view of section 3 is that it has itself failed to prescribe a standard by which the conduct of the parties affected can be guided, and that the supposed standard which the section designates is a standard which does not exist, and hence the section must fail.

That a statute must itself prescribe or designate the standard by which the parties affected can govern their conduct, to the end that they may avoid incurring the penalties prescribed, is recognized in the following recent cases:

Chicago, M. & St. P. R. Co. vs. Polt, 232 U. S., 165.

International Harvester Co. vs. Kentucky, 234 U. S., 216.

United States vs. Pennsylvania R. Co., decided Dec. 11, 1916.

## THE ENTIRE ACT IS UNCONSTITUTIONAL ON ACCOUNT OF THE INVALIDITY OF SECTION 3.

This is true because the court would not be justified in assuming that Congress would have enacted the other portions of the Act without Section 3.

It is established that a statute must fall as a whole if it fails as to a provision without which there is no reason to suppose the rest of the statute would have been passed. The mere fact that a statute's provisions are logically separable will not sustain it in part if the court believes that the unobjectionable part would not have been enacted by itself.

Employers' Liability Cases, 207 U. S., 463.
McFarland vs. American Sugar Refining Co., 241 U. S., 79.

It is evident from the face of this statute and also from its history that Sections 1 and 2 would not have been enacted without Section 3. There would have been nothing for the Commission of Inquiry appointed under Section 2 to observe unless Section 3 had been enacted. If Section 3 had been omitted, the controversy which Congress was trying to avoid would have been accentuated, because Section 1 by itself (unless operative only in the absence of agreement on some other basis), would have opened up at once for readjustment all the terms of all the contracts in order that those contracts might be reconstructed so as to embody the new standard commanded by Section 1.

## SECTION 1 IS UNCONSTITUTIONAL PER SE.

If the court should conclude that Congress would have passed Section 1, even though unaccompanied by Section 3, it is still true that Section 1 is unconstitutional *per se.*

It may be that Section 1 will be regarded as having an operation only in those cases where the contracts of the parties do not provide some other standard of compensation.

In United States vs. Martin, 94 U. S., 400, the court held that an Act of Congress declaring that "eight hours shall constitute a day's work" for government employees, merely "prescribed the length of time which should amount to a day's work when no special agreement was made upon the subject".

The case of People vs. Phyfe, 136 N. Y., 554, involved a statute providing that "ten hours labor performed within twelve consecutive hours shall constitute a day's labor", in the operation of railroads, provided that this should not affect the mileage system, or regular trips when completed within less hours, and should not apply to extra hours in cases of unavoidable accident. The court held that this was but a statutory definition of what shall constitute a day's labor and would control in any controversy affecting the civil liabilities of the employer in the absence of an express agreement to the contrary. The court held that the penal provision of the statute relating to "the violation of any of the provisions of this Act" did not pertain to the provision above quoted at all, but merely to another section putting an absolute limitation of twenty-four hours upon the length of continuous service.

If this court, on the same principle, shall hold that Section 1 of the Adamson Act means no more than was attributed to the similar provisions of the statutes involved in the two cases last cited, the Section has less practical importance, but, with that meaning, the Section has no sub-

stantial relation to the promotion of commerce among the states, and is nothing more than an unwarranted interference with a matter which *per se* is not within the jurisdiction of Congress.

It may be that the court will hold that Section 1 has no application except when contracts are exclusively upon a day basis, so that it would not apply to contracts on the monthly basis or partly or wholly on the mileage basis, and so that the parties would be free to avoid the exclusive day basis. Even then the statute would be without substantial relation to interstate commerce and beyond the power of Congress.

If, however, the court takes the view that the Section is mandatory in character and, if valid, must be effective even when the parties have contracted or wish to contract otherwise, then the matter becomes of great practical importance and we submit that the Section, with any mandatory construction placed upon it, is also unconstitutional.

## If Section 1 Is Mandatory in Its Operation, It Is an Arbitrary Interference with Reasonable Methods of Contracting and Has No Substantial Relation to the Promotion of Commerce Among the States.

Section 1 declares that beginning January 1, 1917, "eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees" actually engaged in any capacity in the operation of trains.

If this provision is mandatory, it is clearly unconstitutional. This result is illustrated by reference to the present schedules of the appellee's railroad.

The engineers are now paid in accordance with an agreement which fixes the standard or measure of compensation (Transcript, p. 24) as follows:

| Class of Service. | Rate 100 Mi. or less. | Mile per Hr. basis. | Overtime per hour. |
|---|---|---|---|
| Passenger | $4.40 | 18 | $ .44 |
| Local freight, other than Mallet | 5.55 | 10 | .555 |
| Local freight, Mallet type | 6.50 | 10 | .65 |
| Through freight, other than Mallet | 5.20 | 10 | .52 |
| Through freight, Mallet engine | 6.15 | 10 | .615 |
| Yard engine, other than Mallet | 4.25 | 10 | .425 |
| Work train, other than Mallet | 4.40 | 10 | .44 |
| Mixed runs, other than Mallet | 5.55 | 10 | .555 |
| Mixed runs, Mallet engine | 6.50 | 10 | .65 |
| Mine runs, other than Mallet | 5.55 | 10 | .555 |
| Mine runs, Mallet | 6.50 | 10 | .65 |

When the run is not made at the average speed agreed upon, overtime is paid for the time required for the run in excess of what would have been required if the agreed average speed had been made and the rate per hour for overtime is specified in the agreement.

In this contract for labor and service, there is no defined "day's work" and the actual "day's work" is the trip or run, whatever it may be, and eight hours is not the "standard or measure of compensation."

To comply with Section 1 as a mandatory requirement, something substantially different must be substituted for the present method of reckoning compensation.

To paraphrase again the language of this court in Lochner vs. New York, 198 U. S., 45, 61, and to make it applicable to an attempted exercise of the commerce power of Congress, such an interference with the method of ascertaining compensation cannot be sustained unless there be some fair ground, reasonable in and of itself, to say that there is a material danger to commerce among the States if the present method of reckoning compensation is not changed.

We assert with confidence that the court cannot find from the nature of the present agreement, or from anything in the

record, or from common knowledge of the general situation, that there is anything injurious to commerce among the States in the method of reckoning compensation which is used in this agreement, or any basis whatever to say that the parties thereto shall no longer have the right to reckon compensation on that basis but must instead reckon the compensation on the basis of an eight hour standard work day.

The requirement of Section 1, if mandatory, cannot be fully satisfied except by excluding entirely the present mileage basis and substituting therefor as an exclusive basis the eight hour standard work day.

Suppose an engineer in passenger service makes a run of 180 miles in nine hours. He is now paid for his 180 miles without regard to an eight hour standard work day or to any other standard work day. If Section 1 is mandatory, the eight hour standard work day must become the measure or standard by which his compensation is reckoned. Such a requirement has no substantial relation to the promotion of interstate commerce and is only an arbitrary interference with the reasonable freedom of contract which is protected by the Constitution.

Similar observations apply to the appellee's engineer or conductor in through freight service who may make for example a run of 110 miles in ten hours; to the passenger conductor who makes over 4,000 and not over 6,000 miles per month and is paid therefor $165. In none of these cases is there any actual day's work at present except the trip or run that happens to be made in the day. In none of these cases is the compensation measured by a standard eight-hour work day. In none of these cases is the present method of reckoning compensation in any respect injurious or prejudicial to commerce among the States. In none of them can the statute be complied with except by abandoning the existing method of compensation and substituting a different one.

Examples could be multiplied from the other schedules hereinbefore referred to showing the great variety of bases

wholly differing, generally speaking, from the requirements of the statute, but all of them obviously legitimate and innocent and lacking any suggestion of injury to interstate commerce from their continuance. Can it be anything short of arbitrary interference with reasonable freedom of contract for the statute to wipe out the usual normal methods of compensation and force the substitution of a new standard by which compensation must be measured in the future?

If it be argued that Section 1 operates to put into effect the demand of the Brotherhoods that they be given a 12½ mile speed basis for the computation of overtime, and that this tends to shorten the time on duty, and is therefore an appropriate regulation of commerce among the States, the argument will be answered by what has been said above at pages 27 *et seq.*; Section 1 cannot be given any such construction, and besides the section even with such construction would not be a rule of action for the conduct of interstate transportation; it would still leave the parties free to run the trains at lower rates of speed whenever it might suit their private interest to do so and would merely regulate the method of reckoning compensation; so that even with such construction the statute would have no substantial relation to the regulation of interstate transportation, but would be merely an arbitrary interference with the matter of private contract. Indeed, with such construction, the statute is nothing but a legislative substitute for the object which the Brotherhoods sought in the exercise of their private right of contract and which the railroads refused in the exercise of their private right of contract.

If it be argued that Section 1, whether viewed as prescribing an eight-hour measure, or as prescribing the 12½-mile speed basis, would have a tendency to shorten hours, such argument is covered by what was said in the introductory part of this brief. In addition, a sufficient answer is that Congress has no power to legislate on a subject outside its jurisdiction

on the pretext that an incidental effect of its act might be upon a subject within its jurisdiction.

If it be said that neither of these constructions is right and that the statute neither abolishes all mileage and other bases for reckoning compensation, nor compels their continuance, and that under the correct construction of the statute the parties are free to continue, extend, change or abandon their mileage and other bases of compensation, and that all that Section 1 means is that the parties must also have in every case an eight hour basis, either as the sole basis or along with, and adjusted as the parties see fit to, any other basis which the parties desire, the answers are that the section admits of no such construction, that the arguments applicable to other constructions apply equally to this and that the section with such a construction would lose all semblance of relationship to interstate transportation and would become futile and would be a mere aimless upsetting of existing contracts without any substantial purpose of any character.

## Section 1, if Mandatory, Is Unconstitutional Because It Provides No Standard of Conduct.

Railroad companies and their train service employees have a great variety of agreements by which compensation and services are to be determined.

Section 1 takes a single factor, a given number of hours, and declares that, beginning January 1, 1917, that factor shall be the standard for reckoning compensation.

Assuming that the section means what it says and excludes the usual factor of mileage, the following suggestions as to the working of the statute are submitted, using the rates of pay shown in the appellee's schedules:

A passenger engineer makes a run of 150 miles per day at a speed of 30 miles per hour. Thus his trip is

made in five hours and according to the schedule he gets $6.60 (*i. e.*, 150% of $4.40).

The passenger conductor, however, may make a run of 300 miles in ten hours and do this 20 days in the month (thus making his 6,000 miles), and have layovers for the other ten days in the month. He gets for these services $165 per month.

A fast through freight train makes a run of 125 miles in nine hours. The engineer gets (it is assumed that he does not run a Mallet engine), $6.50 (*i. e.*, 125% of $5.20). The conductor gets $5.23 (*i. e.*, 125 miles at 4.18 cents per mile).

Another through freight train also not hauled by Mallet engine makes 125 miles in 12½ hours. The engineer and the conductor get exactly the same pay respectively as the engineer and conductor respectively receive on the fast through freight train that makes the same run in nine hours.

A local freight train makes a run of 125 miles in 14 hours. The engineer gets (it is assumed he does not run a Mallet engine), $7.77 (*i. e.*, 125 per cent. of $5.55, plus 1½ hours overtime at 55.5 cents per hour). The conductor would get $125.25 per month plus allowance for mileage over 100 miles and for overtime.

To avoid undue bewilderment we omit reference to additional payments for extras and refrain from suggesting still further examples.

It is plain that the only way to change the foregoing employees from the present methods of reckoning their compensation to the method of reckoning it according to an eight hour standard work day is to agree with them anew on rates of pay for a standard eight hour work day. It cannot be said that this necessity is obviated by the requirements of Section 3 because (1) that section is unconstitutional; (2) it is for a period of only seven to eleven months, while Section 1 is permanent and must be tested as permanent legislation; (3) Section 3, even if constitutional, could not settle

the matter even for the period for which it will be in effect because it is not binding upon the employees and because it does not purport to, and could not possibly by the use of any language whatever, translate existing mileage rates into rates for an eight hour standard work day so as to obviate the necessity for a new agreement as to the rates of pay for the eight hour standard work day. One of the reasons why this is true is that the employees on trains running at varying rates of speed are nevertheless paid at present according to the same rates of pay, so that the trainmen on the fast trains get the same pay for fewer hours of service as is received by the trainmen on the slower trains. Hence the mileage basis as it prevails all over the country does not, as applied to runs of varying speeds, on any railroad, give any uniform rate per hour which would admit of the mileage basis being translated into an hourly basis or into an eight hour basis. As to many important instances, notably conductors and brakemen in passenger service, the situation is even more difficult.

The only way therefore to comply with Section 1, if it means what it says and erects the eight-hour standard work day as the sole measure for reckoning compensation, is to agree anew with the employees on rates which will be mutually satisfactory for reckoning compensation on the basis of the standard eight-hour work day.

What then is the effect of the statute? It is a command under heavy penalties that railroad companies and their employees shall abandon their present methods of reckoning compensation and instead shall come to an agreement upon a new method. The statute provides no standard to which the railroad company can make the employees conform. For example, the two freight conductors who now run 125 miles, one in nine hours and the other in 12½ hours, get the same pay and have the same rates of pay. On an eight hour standard, the conductor on the slow freight would get 156¼% of a day's pay and the conductor on the fast freight would get

112½% of a day's pay. The statute furnishes no standard whereby, in order to reckon pay according to an eight hour standard, the railroad company can compel the nine-hour conductor to accept substantially less *total pay*, so as to preserve the same rate of pay for both, or whereby the railroad company can compel the 12½ hour conductor to accept a substantially lower *rate of pay*, so as to preserve the same total pay for both, nor does the statute furnish any other standard whereby the railroad company can compel these employees to agree upon any new rate whatever. If the parties come to a deadlock, the statute furnishes no standard whereby it can be decided which party is at fault. Apparently the statute contemplates that both parties shall be penalized for exercising their right to contract or not contract respecting a matter as to which the statute furnishes no standard whatever. We contend that the statute is therefore lacking in the very fundamentals of due process of law.

The imposition of penalties of fine and imprisonment for failure to carry out a statute whose performance is entirely dependent upon one party to the contract prevailing upon the other party to the contract to do something which he is not obliged to do and concerning which the statute affords no standard, is open to condemnation to the same extent as other statutes and public requirements which have been condemned by the court on account of their imposing punishments for failure to do things which are not reasonably capable of ascertainment.

In Chicago, M. & St. P. vs. Polt, 232 U. S., 165, the court declared unconstitutional a statute penalizing a railroad company for failure promptly to pay damage claims, showing that the railroad company "is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand."

In International Harvester Co. vs. Kentucky, 234 U. S.,

216, the court declared unconstitutional a statute of Kentucky which, as construed by the Kentucky Court of Appeals, in effect compelled a man to guess what the fair market value of his products would be under other than existing conditions.

In United States vs. Pennsylvania R. Co., decided December 11, 1916, this court, commenting upon an order of the Interstate Commerce Commission requiring the furnishing of tank cars, referred to the vague features of the order as being very serious considerations, but held the order invalid on other grounds.

In United States vs. Northern Pacific Ry. Co., decided December 4, 1916, this court, in holding that the company was not guilty of the alleged violation of the Hours of Service Act, said :

> " Statutes should be construed, as far as possible, so that those subject to their control may, by reference to their terms, ascertain the measure of their duty and obligation, rather than that such measure should be dependent upon the discretion of executive officers, to the end that ours may continue to be a Government of written laws rather than one of official grace."

While none of the cases cited presents the exact situation presented here, yet the fundamental injustice involved here is fully as great as in the cases cited, and it would be as much a deprivation of property without due process of law to punish railroad companies for a failure to comply with Section 1 of the Adamson Act as it would be to punish persons for failure to comply with the statutes or requirements commented upon adversely in the cases cited.

It is no answer to the foregoing argument to say that it is always necessary, either with or without such a statute, for the parties to agree upon terms, and hence that the statute cannot be condemned because it involves the necessity for a new agreement adapted to the statutory standards. It is one thing for the parties to be under the

ordinary economic or business necessity for agreeing upon terms; it is quite another thing for a statute to command them to agree upon new terms and impose fines and imprisonment for failure to do so. Again, it is one thing for parties to agree upon terms in the light of the established traditions of the business and in pursuance of settled habits of thought on the subject; but it is a very different and far more difficult thing for a statute to disrupt existing contracts, where all the various terms have a relationship to each other, and to a greater or less extent are inter-dependent considerations for each other and to command the parties to abandon existing standards, adopt new points of view, and construct a new contract upon the statutory basis. It is one thing for contracts of employment to develop through the ordinary processes of business and economic evolution, changes being made from time to time in pursuance of the demands of either side so far as they are accepted by the other side; it is a vastly different thing for a statute at one stroke to command that what has always been the primary standard for reckoning compensation, to which all others are related, shall be abandoned, and instead a new standard, not only primary but exclusive, shall be erected and contracts re-made in the light of this fundamental change.

The same constitutional objection to the failure of Section 1 to provide a standard of conduct would apply if the statute could be construed, or had expressly provided, that the new eight hour standard work day might be employed along with the existing mileage standards or with any other mileage standards which the parties might see fit hereafter to adopt.

Suppose the statute, in order to express such a rule, had declared that hereafter an eight hour standard work day must be used for reckoning compensation and must be adapted to and co-ordinated with any mileage standard now or hereafter used. It would still have been necessary for the company and their employees to readjust their schedules so as to comply with this requirement.

In the case of a passenger engineer paid $5 per 100 miles on a 20-mile speed basis (with the result that a period of five hours would be regarded as in a sense the equivalent of 100 miles), the parties would have to decide whether to continue the 100 mile standard, along with the eight hour standard, thereby reducing the speed basis to 12½ miles per hour, or to make 160 miles the mileage standard so as to preserve the speed basis of 20 miles, or to adopt some other relation or to abandon the mileage basis; and would have to decide also, whatever the change made in these respects, what rate of pay should be prescribed for the new eight hour standard as well as an other co-ordinated standard that might be adopted.

In the case of a passenger conductor paid $165 per month for 6,000 miles, the parties would have to originate some way for injecting a time standard into the schedule, and for making that time standard eight hours (although the conductor may not work but 20 days in the month), and to decide what the rate of pay therefor should be, and to decide whether to retain the mileage basis, and, if so, how, or whether to abandon it.

In the case of a freight conductor paid on the basis of so many cents per mile, safeguarded by a 10 mile speed basis, thereby making 10 hours in a sense the equivalent of 100 miles, it would be necessary to decide whether to treat 100 miles as the equivalent of eight hours, and thereby raise the speed basis to 12½ miles, or to use a mileage equivalent of 80 miles so as to preserve the 10 mile speed basis, or to adopt some other course, and also to decide what rate of pay should apply to the new standard or standards.

In addition, there would arise a myriad of questions as to the existing extra allowances or arbitraries. When a trainman is on a 10 mile per hour basis, the railroad company may be willing to agree to pay him without extras and yet may not be willing to do so if he is on a 12½ mile speed basis.

This record shows that in respect of the agreements on appellee's railroad

> " said agreements provide many different measures, standards, and rules for reckoning and affecting the compensation for the piece of work performed by said employees, and that in any one agreement the various measures, standards, and rules therein used are related to each other and each constitutes in part the consideration for the others " (Transcript, p. 4).

The schedules of other companies hereinbefore discussed emphasize this condition in a great variety of ways.

The whole schedule from one end to the other would be laid open for revision in order to comply with any such statute. At every step there would be a chance for advantage to one party and for a disadvantage to the other party in any possible adjustment of the eight hour standard to all other existing standards. The statute furnishes no standard by which any one of these questions could be settled. If the parties could not agree, the new standard could not be put into effect and the statute would not be complied with. Yet its violation would be because neither party is told by the statute what it must do and because no way is provided by the statute to settle, in the event of deadlock, which party is in the right or whether both are in the wrong.

But it may be said that all these difficulties will disappear if Section 1 is construed to mean that all existing mileage units, whatever they are, and all methods for additional pay by way of extras or allowances, whatever they are shall be retained without change, and that the new eight hour standard work day shall be read into the schedules along with all these other matters. As above pointed out, such a construction would be wholly unwarranted, and with that construction the section would be clearly unconstitutional. But even such construction would not meet the present point, because such construction would still leave open the question

as to what the rates of pay and the conditions of employment shall be under this radically different form of schedule. If the statute was so expressed as to have the effect here discussed, it would amount (besides not being a regulation of commerce and besides being an unreasonable interference with liberty of contract and the use of property), to this: that the statute in effect perpetuates the present form of schedule in all respects and prohibits any change therein, except that the statute injects into the schedule an eight hour standard work day, in addition to any other standard or standards that may already be in the schedule, and declares that if the parties do not work under that schedule they shall be guilty of misdemeanors and subject to fine and imprisonment; and yet provides no rate of pay, leaving that open to the negotiation of the parties, and provides no method whereby an agreement upon that subject can be brought about. Of course, without an agreement upon this vital point Section 1 cannot be complied with; and yet the failure to comply with it would be due to the fact that the statute has required a course of conduct, but has left to the private views of the parties the ultimate standard which will control the whole matter.

This difficulty is not met by Section 3 because that section is unconstitutional; and even if constitutional, it is purely temporary, whereas Section 1 is permanent, and its constitutionality must be tested on the basis of the other provisions of the statute, which are permanent, and not upon the basis of those which are purely temporary; and because no construction of Section 3 can settle, even for the period for which it is effective, the varied controversies opened up by Section 1.

If it be urged that the 12½ mile speed basis is already in effect on numerous railroads and that this proves the practicability of the scheme and the practicability of Section 1, the answers are:

Section 1 cannot be construed as putting into effect the 12½

mile speed basis; the fundamental differences between the language of Section 1 and the language of the wage schedules establishing the 12½ mile speed basis are conclusive evidence on this point. But where the 12½ mile speed basis is used, it exists as a result of agreement between the railroads and the employees on all the inter-related parts of the wage schedules and these are the very things that would have to be agreed upon in order to put the basis into effect on other roads and they are things as to which Section 1 provides no standard. Even on the roads having a 12½-mile speed basis, that basis does not now apply to all traffic but ordinarily applies only to through freight service, leaving not only passenger service, but local freight service, branch line freight service, work train service, etc., controlled by other methods and standards; the very fact of these persistent distinctions on the railroads which have the 12½-mile speed basis in some traffic emphasizes its inapplicability as a universal rule and emphasizes the difficulties in the way of agreeing with employees in all traffic upon all the changes in their rates of pay and conditions of service which would be necessary in connection with such a fundamental readjustment.

Furthermore, the fact that the 12½ mile speed basis, even in through freight service, is restricted in such a definite way to a comparatively small part of the railroad mileage and in only certain parts of the country suggests the existence of practical reasons why the same system should not have corresponding application in other parts of the country. Manifestly railroads so situated, on account of having an unusual proporrtion of fast freight traffic, or on account of other conditions, as to be able economically to give a fast movement, are much less affected by a 12½ mile speed basis than are other railroads whose traffic is largely of such a character that it can only be moved economically in much heavier trainloads at slower speed or whose operating conditions are of such a character that the higher speed is not

practicable. Moreover, these probable differences in condition emphasize the great difficulty which would be encountered by the railroads generally, which do not have the 12½ mile basis in any controlling part of their freight traffic, in making by agreement with their employees all the readjustments necessary in order to arrive at rates and conditions which would be equitable as applied to such a basis; and Section 1 furnishes no standards by which these readjustments may be made.

### If Section 1 on its face is unconstitutional, it cannot be saved by the argument that it was passed in order to settle a labor dispute or to avoid a strike.

The proposition stated in the heading is sustained by what has already been said in respect of Section 3 under the headings on pages 49 *et seq.* and 54 *et seq.*

## THE ACT IS VOID ON ACCOUNT OF ITS ARBITRARY DISCRIMINATIONS.

The act does not apply to any employee except those who are actually engaged in the operation of trains. It does not apply to any electric street railroads or electric interurban railroads, although engaged in interstate transportation. It does not apply to any railroads not exceeding 100 miles in length, except that it (1) does apply to a railroad not exceeding 100 miles in length, if it is not "independently owned and operated," and (2) does apply to a railroad not exceeding 100 miles in length "whose principal business is leasing or furnishing terminal or transfer facilities to other railroads," or which is "engaged in transfers of freight between railroads or between railroads and industrial plants."

We claim that the act is void on account of these arbitrary discriminations.

We present this point with a full appreciation of the view of this Court as expressed in the Second Employers Liability Cases, 223 U. S., 1, 52, as follows:

> "Even if it be assumed that that clause" (the Fifth Amendment) "is equivalent to the 'equal protection of the laws' clause of the Fourteenth Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary."

We have already shown that this act does not limit the hours of service and that it has no legal tendency to promote any established policy that hours of train service shall be shortened. Hence, the classification, and the resulting discriminations, established by the act, cannot be justified by invoking any reason which might be applicable to a statute limiting or shortening hours of service. The cases relied upon by the appellant to sustain the classification can all be distinguished because the classifications sustained in those cases were reasonable from the standpoint of promoting safety, or from some other standpoint of reasonable relationship to a constitutional purpose. Even if this act had a legal relationship to shortening of hours of service, it would still be open to question whether there is any basis for excluding electric lines, or any basis for excluding a part of railroads of 100 miles or less in length, especially in view of the inclusion of other railroads of less than 100 miles in length, for apparently arbitrary reasons.

But we have shown that the object of this act is the object expressed on its face, to wit: to interfere with and control the contracts between the railroad company and its employees

in respect of the standard for reckoning wages and in respect of the amount of wages.

In view of this declared purpose of the statute, we submit that the discriminations made by the statute are wholly arbitrary and indefensible.

There is only one rational explanation of the discriminations which were adopted in this statute, and that is, that they were a part of the policy of giving certain advantages in response to the insistence of the four brotherhoods, and of not giving them where the brotherhoods were not insisting on them. No demands were being urged against electric street railroads and electric interurban railroads, or generally against those railroads not exceeding 100 miles in length, except (1) in the case of such railroads which are operated as parts of the system of the larger railroads and (2) in the case of those railroads whose principal business is leasing or furnishing terminal or transfer facilities to other railroads or are themselves engaged in transferring freight between railroads or between railroads and industrial plants. The statute was careful to include these two exceptions in its provisions.

Of course, the line of demarcation between the employees for whom the brotherhoods were making demands, and other employees, is not exactly defined by the exceptions described in this statute, and could not be defined with precision by any simple form of expression. Nevertheless, the classification which this statute adopts does have a substantial tendency to exclude employees for whom the brotherhoods were not making demands, and to include employees for whom the brotherhoods were making demands, and there is no other substantial reason to explain it.

We therefore submit that the classification as between railroads cannot be supported on any rational principle, but is wholly arbitrary.

We further point out that the statute operates to compel

the Appellees' railroad, and all other railroads, to discriminate unjustly in favor of employees in train service. The complaint herein alleges that the act "seeks to compel these complainants to discriminate unjustly and arbitrarily in favor of those employees (employees covered by the act) and against many others who have no less right to equal treatment" (Transcript, p. 9).

Even though the Court should be disposed to declare that Congress has jurisdiction to control or prescribe the wages of employees of interstate carriers, it is submitted that this act, operating arbitrarily in favor of the employes for whom these four brotherhoods were making demands, and operating arbitrarily against the other four-fifths of railroad employes, is an arbitrary and unconstitutional discrimination.

The railroad itself is entitled to complain of being compelled to discriminate against other employees, and of being compelled to devote to the favored class property upon which the classes discriminated against have at least an equal claim.

## THE ACT IS VOID ON ACCOUNT OF THE EXCESSIVE PENALTIES.

Section 4 of the Act provides:

> "That any person violating any provision of this act shall be guilty of a misdemeanor, and upon conviction shall be fined not less than $100 and not more than $1,000, or imprisoned not to exeed one year, or both."

Apparently each payment to each employee in violation of Section 3 would constitute a separate offense. Paydays are usually monthly or semi-monthly. It is by no means certain as to what would constitute the separate offenses under Section 1. The statute is open to the construction that each time the pay of an employee for a trip is computed

upon any other basis than according to the 8 hour standard prescribed in Section 1, there would be a violation of that Section. Hence, the statute is open to the construction that there would be a separate violation of Section 1 as to each employee as to each trip if that Section were not observed. But even if the statute were construed as creating only one or two separate offenses per month, in respect of Section 1, for each employee, if that Section were not observed, it is obvious that the money penalties would be staggering in amount, to say nothing of the penalties of imprisonment. On the question as to what is a separate offense, see Missouri, Kansas & Texas v. United States, 231 U. S., 112.

This statute does not deal with things which are in themselves immoral or illegitimate. It deals with current business matters (if it can be given sufficient certainty to be effective), provides new standards in the place of other standards which have always been lawful and proper. There is nothing in the traditions or practices of the railroad business world which affords any guide to determine what is right and what is wrong under the statute.

The statute makes no provision for any ascertainment in advance by either judicial tribunals or administrative tribunals as to what its vague and general provisions mean as applied to the exceedingly complicated subject-matter with which the statute undertakes to deal.

Moreover, the statute is amazingly obscure when the effort is made to give it actual application to the concrete cases to which it must be applied if enforcible.

We have pointed out the uncertainties of this statute in various parts of this brief. We refer to what we have said as to the methods of reckoning compensation of train service employees; as to the proposition that the act has no direct tendency to shorten hours of train service (especially subdivisions III. and V. of that proposition); as to the proposition that Section 3 is void for its failure to define a

standard of conduct; and as to the proposition that Section 1 is void because it provides no standard of conduct; all these matters indicate the extraordinary difficulties arising under this statute.

In view of these considerations, it is submitted that the statute should be regarded as void on account of the excessive penalties. See Bonnett vs. Vallier, 136 Wis., 193, which was cited with apparent approval by this Court in Wadley Southern Railway vs. Georgia, 235 U. S., 651, 655, where a penalty statute was held void, which imposed cumulative fines for failing to comply with indefinite and uncertain regulations as to the construction in tenement houses. In that case the Supreme Court of Wisconsin held, among other things, that "a general police regulation down to minute particulars of the construction and maintenance of tenement houses, rendering it impracticable to safely comply therewith in the absence of any official approval of plans and specifications in advance and containing no provision for such approval, is unreasonable."

In the Wadley Southern case, *supra*, this Court reviewed on pages 661 to 666 cases dealing with statutes imposing burdensome penalties in respect of ordinary business matters subject to statutory regulations. The Court's decision, as well as the case of Bonnett vs. Vallier, *supra*, cited by it, indicated that in such matters there is a constitutional limit beyond which legislative bodies cannot go in regulating legitimate and complicated business affairs through the same scheme of fines and penalties which may be entirely appropriate in many other classes of cases. We submit that that limit has been far exceeded in the present case and that any scheme of enforcing this exceedingly obscure and difficult statute in respect of such an unusually complicated business structure by means of fines and imprisonment, is strikingly unjust and unreasonable and is wanting in due process of law.

We respectfully submit that the Adamson Act is unconstitutional and that the decree of the District Court enjoining the defendant from enforcing that Act should be affirmed.

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January 5, 1917

# APPENDIX I.

## State Legislation Limiting Hours of Service.

ARIZONA, (Act of March 18, 1903): "No company * * * shall require" any trainman "who has worked in his respective capacity for sixteen consecutive hours, except in case of casualty or actual necessity, to again go on duty or perform any work until he has had at least nine hours' rest."

Penal Code 1913, Section 405, page 87.

ARKANSAS, (Act of April 14, 1903): A company "shall not permit or require" any trainman "who has worked in his respective capacity for sixteen consecutive hours to again be required to go on duty or perform any work until he has had at least eight hours' rest, except in case of wrecks or wash-out."

Kirby's Digest of the Statutes of Arkansas, 1904, Vol. I., Section 6652, page 1381.

CALIFORNIA, (Act of April 21, 1911, as amended by Act of June 4, 1913): It shall be unlawful "to require or knowingly permit" any trainman "to be or remain or duty for a longer period than sixteen consecutive hours." * * * "The provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier its or its officer or agent in charge of such employee at the time said employee left a terminal and which could not have been foreseen; and * * * shall not apply to the crews of wrecking or relief trains."

Laws 1913, Chapter 226, page 381.

COLORADO (Act of February 19, 1901): No Company "shall permit or require" any trainman "who has worked in

his respective capacity for sixteen consecutive hours, except in case of casualty, to again go on duty or perform any work until he has had at least ten hours' rest".

Mills' Annotated Statutes, 1912, Section 6164.

FLORIDA (Act of May 22, 1893): It shall be unlawful "to require or permit" train operatives "to make runs of over thirteen hours or make runs aggregating more than thirteen hours in any twenty-four hours, except when such train is detained by reason of casualty or other cause from reaching its destination on schedule time".

General Statutes, 1906, Section 2843, page 1112.

GEORGIA (Act of October 20, 1891): No railroad "shall require or permit" its train operatives "to make runs over thirteen hours, or make runs aggregating more than thirteen hours in any twenty-four hours, except when such train is detained by reason of casualty, or other cause, from reaching its destination, on schedule time".

Code, 1911, Vol. I., Section 2693, page 716.

INDIANA (Act of March 8, 1907): It shall be unlawful "to permit, exact, demand or require" any train service employee "to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such employee has started on his trip, or by unknown casualty occurring before he started on his trip, he is prevented from reaching his terminal."

Burns' Annotated Statutes, 1914, Section 5304.

IOWA (Act of April 2, 1907): It shall be unlawful "to require or permit" any train service employee "to remain on duty more than sixteen consecutive hours"; * * * "This section shall not apply to work performed in the protection of life or property in the case of accident, wreck or other unavoidable casualty, or prevent train crews from taking the

passenger train or freight train loaded exclusively with live-stock or perishable freight to the next nearest division point upon such railroad; and * * * shall not apply to that time necessary for the trainmen to reach a resting place when an accident, wreck, washout, snow-blockade or other unavoidable cause has delayed their train."

Supplement to Code of Iowa, 1913, Pages 803–804 Section 2110*a*.

KANSAS (Act of March 7, 1905, as amended by Act of May 27, 1907): It shall be unlawful "to require or permit" any trainman "who has worked in his respective capacity for sixteen consecutive hours to continue on duty or perform any work for such railroad until he has had at least eight hours' rest; provided that this Act shall not apply in case of washout, wrecks or unavoidable blockades, nor shall it be construed to prevent the crew of a train which contains live stock or perishable freight in carload lots from running to the next division point, after the expiration of the time limit provided for in this Act."

General Statutes, 1909, Dassler, Section 7129.

MICHIGAN (Act of August 28, 1893): No company "shall permit or require any trainman who has worked in any capacity for twenty-four hours to again go on duty or perform any kind of work until he has had at least eight hours' rest." This shall not apply to extra hours of labor performed by "any trainman" in cases of unavoidable accident or delay caused by such accident."

Howell's Annotated Statutes, Vol. III, Page 2819, Section 6887.

MINNESOTA (Act of March 19, 1903): "Locomotive engineers, and firemen shall not be required to serve as such for more than fourteen consecutive hours. But nothing herein shall permit any such engineer or fireman to desert his loco-

motive when, by reason of accident or delay caused by the elements, another cannot immediately be procured to take his place, nor prohibit him, in any case, from serving longer than fourteen hours if he so desires."

Minnesota General Statutes, 1913, Section 3834.

MINNESOTA, Continued (Act of April 19, 1907): It shall be unlawful "to require or permit" any train service employee "to remain on duty more than sixteen consecutive hours * * * This section shall not apply to work performed in the protection of life or property in case of accident, wreck or other unavoidable casuality; and * * * shall not apply to the time necessary for trainman to reach a resting place when an accident, wreck, washout, snow-blockade or other unavoidable cause has delayed their train."

Minnesota General Statutes, 1913, Section 3835).

MISSOURI (Act of March, 1905): It shall be unlawful "to require or permit" any trainman "who has worked in his respective capacity for sixteen hours within a day of twenty-four hours to again go on duty or perform any work for such railroad until he has had at least eight hours rest." This "shall not apply in case of accident or casualty or prevent train crews from taking a passenger train or freight train loaded exclusively with live stock or perishable freight to the next nearest division point upon such railroad" (Laws 1905, p. 112).

MONTANA (Act of February 5, 1907): "The time of labor" of train service employees "shall not at any time exceed sixteen consecutive hours * * * provided, however, that nothing in this section shall be construed to allow any engineer, fireman, conductor or trainman to desert his locomotive or train in case of accident, storms, wrecks, washouts, snow blockade, or any unavoidable delay arising from like causes, or to allow said engineer, fireman, conductor or trainman to tie up any passenger or mail train between terminals."

Section 1, 10th Session Laws, Chapter 5.

NEBRASKA (Act of March 13, 1911): It shall be unlawful "to require or permit" train service employees "to be or remain on duty for a longer period than sixteen consecutive hours." This "shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agents in charge of such employees at the time said employees left a terminal, and which could not have been foreseen; "and * * * " shall not apply to the crews of wrecking or relief trains".

Revised Statutes Nebraska, 1913, Sections 6088, 6089.

NEVADA (Act of March 31, 1913): It shall be unlawful "to require or permit" any train service employee "to be or remain on duty for a longer period than sixteen consecutive hours". This "shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen" and "shall not apply to crews of wrecking or relief trains."

Session Laws, 1913, page 491, Chapter 283.

NEW MEXICO (Act of June 10, 1912): It shall be unlawful "to require or permit" any train service employee "to remain on duty for a longer period than sixteen consecutive hours * * *;" provided this "shall not apply in cases of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the railway company or its officer or agent in charge of such employee at the time such employee left the terminal point and which could not have been foreseen;" and * * * "shall not apply to the time necessary for train crews to take passenger trains and freight trains loaded with live-stock or perishable freight to the next nearest division point;" nor "shall it apply to

the time necessary for trainmen to reach a resting place when an accident, wreck, washout, snow-blockade, or other unavoidable cause has delayed their train;" and shall not "apply to crews on wrecking or relief trains."

New Mexico Statutes Annotated, Vol. II., page 1377, Section 4755.

NEW YORK (Act of May 20, 1892, as amended by Act of May 9, 1913)—No company "shall permit or require" any trainman "to be or remain on duty for a longer period than sixteen consecutive hours * * * except when by casualty occurring after he has started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which he is serving, he is prevented from reaching his terminal" (Laws of 1892, p. 1466, as amended by laws of 1913, chap. 462).

NORTH CAROLINA (Act of March 6, 1911)—It shall be unlawful "to require or permit" train service employees "to be or remain on duty for a longer period than sixteen consecutive hours." This "shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal and which could not have been foreseen" and "shall not apply to crews of wrecking or relief trains" (Laws of 1911, Chapter 112, Page 275).

NORTH DAKOTA (Act of March 8, 1907): It shall be unlawful "to require or permit" any train service employee "to remain on duty more than sixteen consecutive hours, except when by casualty, storms, wrecks, washouts, snow blockades or any unavoidable delay, arising from like causes, he is prevented from reaching his terminal * * *."

Laws of 1907, Chapter 207.

OHIO (Act of April 15, 1892, as amended by Act of May 7, 1913): A company "shall not permit" a train service employee "who has worked as such for fifteen consecutive hours,

again to go on duty to perform work until he has had at least eight hours' rest, except in case of detention of trains caused by accident unavoidable or otherwise."

Laws of 1892, p. 311, as amended by Acts of 1913, page 557.

OREGON (Act of February 21, 1911) : It shall be unlawful " to require or permit " any train service employee " to be or remain on duty for a longer period than fourteen consecutive hours. * * *" This " shall not apply in any case of casualty or unavoidable accident or the act of God ; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time such employee left a terminal and which could not have been foreseen " and " shall not apply to crews of wrecking or relief trains."

Laws of 1911, Chapter 137, page 183.

SOUTH DAKOTA (Act of February 13, 1907) : No common carrier " shall require or permit " any train service employee " to remain on duty more than sixteen consecutive hours * * *." In any prosecution " it shall be a sufficient defense to show that the employee was prevented from reaching his terminal by any casualty occurring before he started on his trip, or by accident or unexpected delay of trains scheduled to make connections with the train on which such employee was serving." These provisions " shall not be applied to relief or wreck trains."

Laws of 1907, Chapter 220, Sections 1, 2 and 5.

TEXAS (Act of March 20, 1909): It shall be unlawful " to require or permit " any train service employee " to be or remain on duty for a longer period than sixteen consecutive hours ; * * *." This " shall not apply in any case of casualty or unavoidable accident or the act of God ; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of any conductor, engineer,"

etc., "at the time such conductor, engineer," etc., "left a terminal and which act could not have been foreseen" and "shall not apply to crews of wrecking or relief trains."

Revised Civil Statutes, Article 6584, Page 1403.

WASHINGTON (Act of February 18, 1907): It shall be unlawful "to require or permit" any train service employee "to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such employee has started on his trip; or except by accident or unavoidable delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal."

Rem. & Bal. Code, Section 6581.

WISCONSIN (Act of July 16, 1907): It shall be unlawful "to require or permit" any employee "to be or remain on duty for a longer period than sixteen consecutive hours, * * *" These provisions "shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agents in charge of such employee at the time said employee left the terminal, and which could not have been foreseen, nor to the crews of wrecking or relief trains."

Revision of 1911, Sections 1809–1, 1809-*m*.

## An Increase of Speed Means a Diminished Train Load.

"The effect on train resistance of increased speed is to increase it, due to the added atmospheric resistance and to the increase in rolling, oscillating and frictional resistances" (Economics of Railway Operation 1908, by M. L. Byers, pages 495–7).

"It is a well known fact that the energy of the locomotive remains a constant for any speed. The hauling capacity, however, decreases as the speed increases, due to several mechanical reasons; therefore, if it is desired to increase the speed of a train on account of the move-

ment of high class traffic, all that is necessary to determine the train load to be hauled is to know the rate of speed at which it is desired to move it. By referring to the attached speed tabulation, the reduction in hauling capacity as the speed increases is obtained by taking a percentage of the slow train load corresponding to the speed desired. Another tabulation is also attached showing the variations in weight of train which must be made for variations of temperature.

Relation of speed to weight of train. Ten miles an hour has been found to be the most economic speed at which freight trains can be moved. It has therefore been chosen as the 100 per cent speed in this analysis. All varying train loads for change in speed from this as a base are computed as a percentage ratio to the ten mile per hour speed, as follows :

| Speed Miles per Hour. | Allowable Weight of Train in Per Cent. |
|---|---|
| 5 | 120 per cent. |
| 10 basis of calculation | 100 " " |
| 12 | 85 " " |
| 15 | 60 " " |
| 16 | 55 " " |
| 17 | 50 " " |
| 18 | 46 " " |
| 20 | 40 " " |
| 25 | 31 " " |
| 30 | 27 " " |

Effects of temperature on weight of train. Any reduction in temperature below that of the freezing point begins to rapidly increase the train resistance, and for this reason it is recommended that a reduction on a percentage basis of the normal weight of train be made as follows :

| Temperature From | To | Reduction in weight of train in per cent. |
|---|---|---|
| 32 | 10 | 10 per cent. |
| 10 | Zero | 20 per cent. |
| Zero | -10 | 30 per cent. |
| -10 | -20 | 40 per cent. |

Extract from article (being report of Committee of operating officials of Illinois Central Railroad Company), in Railway Engineering Review, V. 52, pp. 958–959 ; Oct. 19, 1912.

## Interstate Commerce Commission's View that Increased Train Loading is Important Factor of Economy.

In the Eastern Rate Advance, Case 20 I. C. Rep., 243, the Commission said:

> "In recent years very great economies have been introduced into the handling of traffic upon most of our railroads. Curves have been eliminated and grades reduced, larger cars and stronger engines are employed. *An engineer and a trainman handle more tons per miles today than 15 years ago;* a ton of coal hauls more tons of freight one mile today than in 1896" (p. 275).
>
> "Upon the other hand, there are a set of influences which work in exactly the opposite direction. Comparing 1896 with the present year, nearly all kinds of supplies which enter into the construction, maintenance and operation of a railroad have very much increased in price. Nearly one-half the cost of operation is labor, and it is said that within that period the wages of railroad employees have advanced 30 per cent. We are told that not only has the price of a day's labor increased, but that the efficiency of that labor for various reasons has decreased" (pp. 275, 276).
>
> "It seems fair to assume, therefore, that the general cost to the railroad of its supplies will not be greater in the immediate future than it has been in the immediate past (p. 277).
>
> "The same remark would seem to apply to wages as they stand after the recent increases. Railroad labor, certainly organized railroad labor, is probably as well paid, and some say better paid, than labor of other kinds, upon the average. Railroad employees will hardly expect to receive wages which exceed those paid to other forms of labor for the same grade of service, and this Commission certainly could not permit the charging of rates for the purpose of enabling railroads to pay their laborers extravagant compensation as measured by the general average compensation paid labor in this country as a whole" (p. 278).

In the Five Per Cent. Case, 31 I. C. C. Rep., 351, the Commission said:

"The last 10 years has been a period of remarkable development among the railroads. During that period heavy locomotives have taken the place of the lighter types formerly in use. The small and relatively light wooden freight and passenger cars have been replaced by larger and heavier equipment, some of the cars of each class being made entirely of steel; many of the old cars have also been reconstructed partly with steel. *The more powerful locomotives haul longer and heavier trains with larger trainloads*, and this has required the retirement from service of many of the lighter cars, although still in good repair, because they cannot safely be operated in the same train with the heavier cars of the more recent type" (p. 377).

"Exhibits filed by 30 of the 35 railway systems involved in this proceeding indicate an increase of 9.02 per cent. in the average daily wage paid in 1913 as compared with 1909, and that if the scale of wages for 1909 had been in effect during 1913 the labor costs of the latter year would have been less by about $51,000,000 than they actually were. What part of this amount properly belongs to operating expenses and what part to the betterment and improvement accounts does not appear. It is interesting to note, however, that notwithstanding wages constitute an exceptionally large part of the transportation expenses, this group of expenses has shown a relatively smaller advance than other groups. That the ratio was not still greater in 1913 is a tribute to the ability of operating officials and an evidence of the possibilities in the direction of economy" (p. 379).

"The conclusion that the increase in general operating ratios is largely attributable to the increase in passenger operating expenses, taken in connection with reductions in passenger fares, is confirmed by exhibits *showing a great increase in freight-train loading, which must have counter-balanced in large part the increase in*

*the rate of wages and of other expenses incident to freight traffic.* This information appears by the following table:

| Name of Road. | Average freight-train load. | | Increase. | | Average daily wage, all employees. | | Increase. | |
|---|---|---|---|---|---|---|---|---|
| | 1903 | 1913 | Tons | Per cent. | 1903 | 1913 | Amt. | Per cent. |
| | Tons | Tons | | | | | | |
| Pennsylvania R. R..... | 552.59 | 700.80 | 148.21 | 26.82 | $2.06 | $2.78 | $0.72 | 34.95 |
| Baltimore & Ohio R. R. | 416.43 | 619.97 | 203.54 | 48.88 | 2.01 | 2.45 | .44 | 21.89 |
| New York Central & Hudson River R. R... | 367.79 | 497.84 | 130.05 | 35.36 | 2.11 | 2.69 | .58 | 27.49 |
| Norfolk & Western Ry. | 486.27 | 763.84 | 277.57 | 57.08 | 1.85 | 2.55 | .70 | 37.84 |
| Kanawha & Michigan R. R..... ..... ..... | 444.97 | 987.02 | 492.05 | 110.58 | 1.90 | 2.62 | .72 | 37.89 |
| Hocking Valley Ry..... | 611.49 | 987.81 | 376.32 | 61.54 | 2.04 | 2.41 | .37 | 18.14 |
| Pittsburg & Lake Erie R. R..... ..... ..... | 866.57 | 1257.00 | 390.43 | 45.05 | 2.07 | 2.73 | .66 | 31.88 |
| Bessemer & Lake Erie R. R..... ..... | 917.70 | 1108.66 | 190.96 | 20.81 | 2.06 | 2.62 | .56 | 27.18 |

p. 391.

"Passenger fares are paid directly to the carriers by those making use of the service, and they know what it costs them. Payments for freight charges, while less direct, are none the less actual. The general public does not know, and probably does not stop to consider what proportion of the cost of a ton of coal, or of the price of a dwelling, or the rent of an apartment represents freight charges, but the cost of freight transportation enters into the cost or selling price of practically everything used by the public. In many cases to be sure freight charges represent but a small proportion of the total cost of things used or consumed, but it is quite probable that the average family pays much more in the course of a year as freight charges than it does for passenger fares" (pp. 391, 392).

Office Supreme Court, U. S.
FILED
JAN 8 1917
JAMES D. MAHER

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1916.

FRANCIS M. WILSON, United States Attorney for the Western District of Missouri,
*Appellant,*
*vs.*
ALEXANDER NEW and HENRY C. FERRIS, as Receivers of the MISSOURI, OKLAHOMA & GULF RAILWAY COMPANY,
*Appellees.*

No. 797.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

## APPENDIX A TO BRIEF FOR APPELLEES.

### THE METHODS OF RECKONING COMPENSATION OF TRAIN-SERVICE EMPLOYES.

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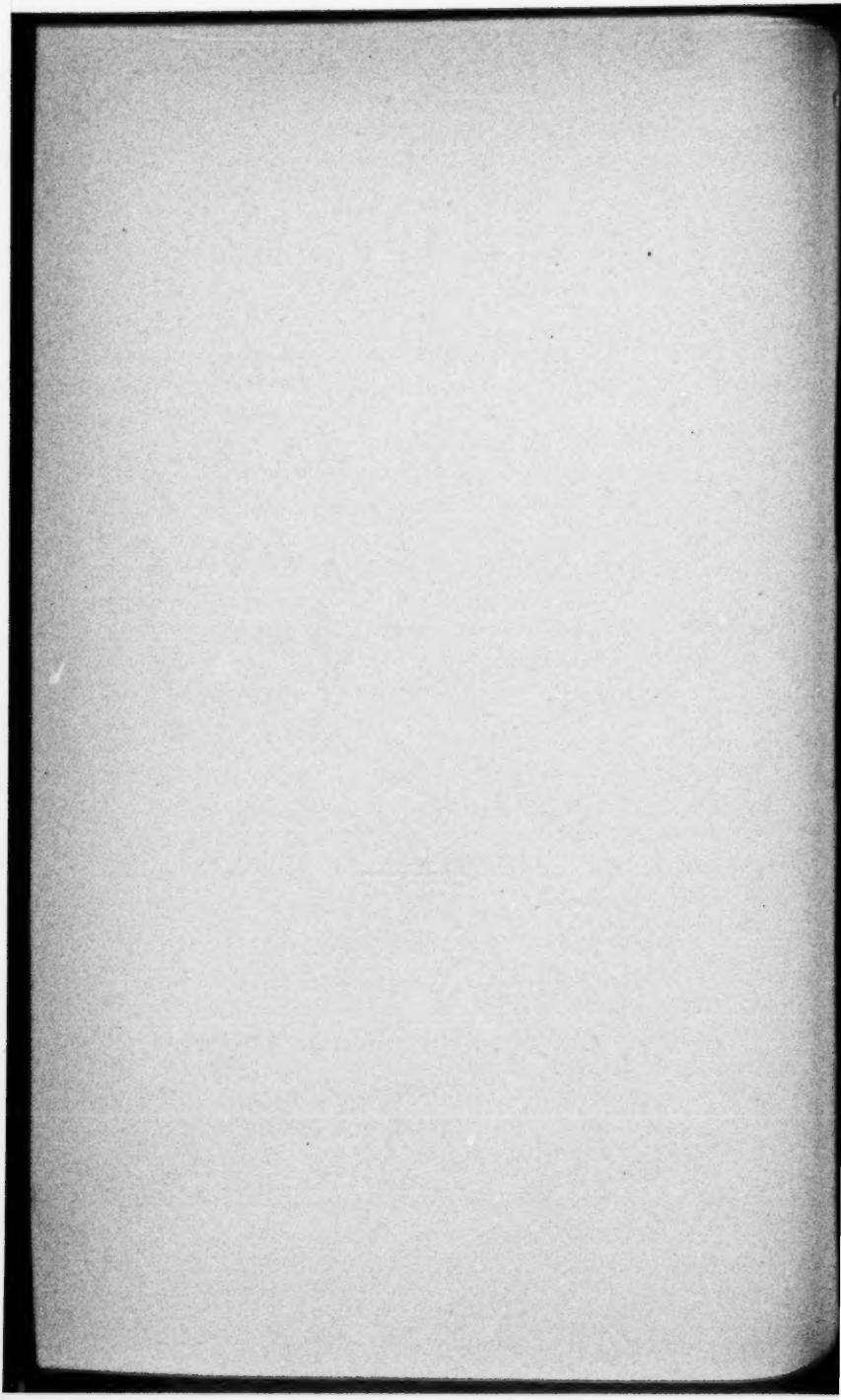

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References to typical examples of the most important and frequently used methods of fixing compensation will be found on the following pages of this Appendix.


| Method of Compensation | Conductors and/or Brakemen | | Engineers and/or Firemen | |
|---|---|---|---|---|
| | Class of Service | Page of Appendix | Class of Service | Page of Appendix |
| I. Rate per mile with minimum mileage | | | Passenger | 18, 57, 66 |
| A. Minimum of 100 miles | Through Freight | 6, 32, 66 | Through Freight | 21, 32, 58 |
| | Local Freight | 14, 25, 58 | Local Freight | 14, 49, 78 |
| | Miscellaneous | 36, 42 | Miscellaneous | 7, 33, 67 |
| B. Minimum of 155 miles | Passenger | 13, 62, 88 | | |
| C. Specified minimum other than 100 or 155 miles | Passenger | 15, 20, 56 | Passenger | 65 |
| | Through Freight | 88 | Local Freight | 18 |
| | Local Freight | 17 | Miscellaneous | 26, 37, 57 |
| | Miscellaneous | 32, 46, 54 | | |
| D. No minimum specified but a guaranteed day's pay (which is equivalent thereto) | | | Passenger | 37, 61, 63 |
| II. Lump sum per trip or per day, not based on mileage | | | | |
| A. Per trip | Passenger | 9, 15, 36 | Passenger | 11, 25, 35 |
| | Through Freight | 10, 30, 36 | Through Freight | 11, 16, 35 |
| | Local Freight | 10, 22, 36 | Local Freight | 12, 35, 89 |
| B. Per day | Passenger | 13, 32 | Passenger | 33, 37, 63 |
| | Through Freight | 44, 58 | Through Freight | 37, 44, 89 |
| | Local Freight | 22, 29 | Local Freight | 33, 37, 59 |
| | Miscellaneous | 32, 71 | Miscellaneous | 70, 73 |

| Method of Compensation | Conductors and/or Brakemen | | Engineers and/or Firemen | |
|---|---|---|---|---|
| | Class of Service | Page of Appendix | Class of Service | Page of Appendix |
| III. Lump sum per month based on : | | | | |
| A. Specified number of trips | Passenger | 29, 46, 50 | Passenger | 44 |
| | Through Freight | 34, 58 | Through Freight | 37 |
| | Local Freight | 34, 50 | Local Freight | 37, 87 |
| B. Specified number of days' work | Passenger | 27, 48, 51 | Passenger | 49 |
| | Through Freight | 27, 56 | Through Freight | 45 |
| | Local Freight | 41, 50, 52 | Local Freight | 37 |
| | Miscellaneous | 31, 39, 48 | Miscellaneous | 49 |
| IV. Lump sum per month for : | | | | |
| A. Mileage over an even minimum | Passenger | 23, 42 | | |
| B. Mileage under an even maximum | Passenger | 41, 42, 48 | | |
| C. Mileage between certain limits | Through Freight | 27 | | |
| | Passenger | 6, 38 | | |

## APPENDIX A.

### The Methods of Reckoning Compensation of Train-Service Employees.

The Bill of Complaint, after referring generally to the agreements between the organizations of train operatives and Appellees, as receivers of the Missouri, Oklahoma & Gulf Railway, alleges as follows the methods of reckoning compensation:

> "Complainants say that none of said agreements contemplate that an employee shall work a fixed number of hours per day; that all of said agreements contemplate, and the peculiarities of railroad train service necessitate, that employees engaged in the operation of a train shall remain on duty until the train reaches the terminal where such train employees reside or can be accommodated with lodging between trips, where the incoming employees can be relieved and replaced by other employees, where there are tracks upon which the train can, without blocking the main tracks, remain while the transfer of crews is taking place, and where there are shops, houses, turn-tables, and tracks for the care of locomotives, so as to relieve the incoming locomotive for cleaning and repair, and so as to replace it with another locomotive which has been prepared for hauling the train beyond that terminal. In other words, complainants say that said employees are and must be required to perform the piece of work assigned to them; that is, to accompany their train until it reaches the end of the run to which they are assigned, so that their work is measured primarily by mileage and not by hours. Complainants further say that, except in local passenger and freight service and work-train service, employees who operate trains do not necessarily work every working day, but, on the contrary, frequently have lay-overs,

sometimes regular and sometimes irregular, of a day or more between trips.

Complainants state that said agreements provide many different measures, standards, and rules for reckoning and affecting the compensation for the pieces of work performed by said employees, and that in any one agreement the various measures, standards, and rules therein used are related to each other and each constitutes in part the consideration for the others.

Complainants state that in many of said agreements the primary basis of compensation is mileage; that in some of the agreements where the primary basis of compensation is mileage the employee is paid a fixed rate for the first 100 miles or less, and *pro rata* for additional mileage, and there is a provision as to hours of service which is designed to insure that the employee shall receive additional pay if his trip is 100 miles or less and requires more than 10 hours, or if his trip is more than 100 miles and is made at an average speed of less than 10 miles per hour; for example, if a trip of 130 miles requires more than 13 hours, the employee, in addition to his mileage, is paid for the time in excess of 13 hours, and in such a contract any overtime is paid for at the rate of 10 miles pay for each hour of overtime.

Complainants state that in other contracts based upon mileage there is no provision whatever for pay by time or by hours, except in cases where the run is not made at required average speed, in which event overtime is paid for the time in excess of what would have been required if the run had been made at the required speed basis in computing overtime; for instance, in the case of passenger trainmen, when the run is not made at an average speed of 15 miles per hour.

Complainants state that whatever the method of reckoning the compensation, the thing paid for is the piece work, to wit, the trip.

Complainants state that in nearly all of their freight train service and in a large part of its passenger-train service the piece of work paid for is a trip exceeding 100 miles in length; that in many cases in freight train

service such trips are made at an average speed of not exceeding 10 miles per hour, and that even where such trips are made at a higher average speed, the length of the trip is frequently such as to require considerably more time than 8 hours to make the trip; and that consequently in passenger-train service considerably more than 8 hours are required to make the trip.

Complainants state that whatever the primary basis of compensation in any one of said agreements may be, there are coupled with it various supplementary measures and standards of reckoning compensation, such as those relating to delays at terminals, incidental switching, loading and unloading live stock, and loading and unloading material, being detained between trips at a terminal other than the home terminal of the employee beyond the specified periods, and being tied up at a point between terminals. Some of the contracts, in determining whether, and if so, how much, overtime has accrued (that is, time in excess of what would have been required if the contract average speed had been maintained), provide that the time shall be from the time the train is ordered to depart from the initial terminal, rather than the time (frequently thirty minutes earlier) when the employee is required to report for duty" (Transcript, pp. 3 to 5).

The Bill of Complaint, after referring particularly to the methods of reckoning compensation of conductors and brakemen in through and irregular freight service, and setting forth the rates per 100 miles, alleges:

"Complainants say that the total compensation actually received by said employees per trip is substantially in excess of said rates per 100 miles because, generally speaking, the trips exceed 100 miles, and there is provided in the schedules the intent that such employees shall make an average of 3,000 miles per month, and generally they make in excess of such mileage; for all of which mileage said employees are paid *pro rata* on the basis of the above rates for 100 miles; and said employees also receive extra pay *pro*

*rata* for overtime if they do not average 10 miles per hour; and said employees also receive extra pay in addition to their mileage pay by reason of the various allowances for work and delay herein set forth.

"Complainants further say that the nature of the 'through and irregular freight service' is such that regular and fixed hours of service are not practicable; that complainants, by virtue of their obligation as a common carrier, have to move freight when and as the same is offered, and that the only practicable way of moving freight expeditiously and economically is to make up and dispatch trains as fast as the necessary amount of freight to constitute a trainload can be received and assembled; that the result is that it is necessary to dispatch trains from terminals whenever trainloads are available; that the conductors and brakemen in such service have irregular layovers and their compensation for any day's service is irregular and dependent upon the service performed and varies from day to day" (Transcript, pp. 10–11).

The bill of complaint also avers:

"Complainants further state that by reason of the fact that none of their service is, or can be, operated upon the basis of a fixed day's labor, and that the wages paid vary according to numerous conditions, which change from day to day, there is no such thing as a 'standard day wage' in railroad service" (Transcript, p. 14).

In order to illustrate the methods for reckoning compensation of train service employees, the detailed facts below set out are taken from the schedules of the Appellees, which are described or set forth in the Transcript, and from the schedules of various other railways, which schedules, it has been agreed with the Attorney General, can be referred to in order to illustrate the provisions of the Act.

Before stating these details, it may be pointed out that all these schedules are very extensive, containing numerous qual-

ifications which operate to restrict or control in special conditions the general rates and methods below set forth. The schedules deal extensively with services which may or which may not be required, with the method by which employees shall be assigned to work, the preference which shall be shown seniority, the protection of employees against being relieved from duty between terminals, the protection of employees against being held too long away from their home terminals, the methods to be observed in making promotions, the methods of discipline and discharge, provision for meals, etc., etc. In addition to the general methods of pay hereinbelow set forth, there are various provisions for making additional pay for services connected with the trip, such as switching, loading or unloading live stock or material, and for delays at initial and final terminals, etc., etc. These methods for supplemental compensation will not be discussed separately as to each company referred to, but will be treated in a general way in the latter part of this Appendix.

## SUMMARIES OF SCHEDULES DESIGNATED BY APPELLEES.

### Missouri, Oklahoma and Gulf.

CONDUCTORS AND BRAKEMEN.

*Passenger Service.*

| | Rate per Month. Conductors. | Brakemen. |
|---|---|---|
| On runs of 4,000 miles or less | $134.20 | $68.75 |
| On runs of 4,000 miles and not to exceed 6,000 miles | 165.00 | 81.05 |
| | Rate per Mile. | |
| Over 6,000 miles per month (Article 2.) | 2.75 | 1.35 |

Overtime rates are 38½c. per hour for Conductors and 27½c. per hour for Brakemen, to be allowed, in the case of road service, on the basis of 15 miles per hour (Article 4).

*Through and Other Freight Service.*

"Conductors will be paid 4.18c. and Brakemen 2.78c. per mile, 100 miles or less, 10 hours or less to constitute a day. Road overtime will be allowed on the basis of 10 miles per hour, less than 30 minutes not to be counted, 30 to 60 minutes will count one hour. Overtime in all classes of freight service will be paid for in the same manner" (Article 5).

Main line local freight and Coalton Branch crews are paid on a monthly basis, "conductors, $125.25, and brakemen, $83.50 per calendar working day month, 100 miles or less, 10 hours or less to constitute a day; overtime after 10 hours to be paid for at *pro rata* rate" (Article 12).

*Work Train Service.*

Conductors are paid $4.38 per day, Brakemen, $2.92 per day, 100 miles or less, 10 hours or less to constitute a day's work. When Conductor acts as foreman of construction or

work train, he receives $30.25 per month additional. Crews regularly assigned to work train service are paid a minimum salary of, conductors, $113.85, brakemen, $75 per calendar month (Article 17).

### Engineers.

In the schedule for engineers, the rates of pay are shown as follows:

| Class of Service. | Rate 100 mi. or less. | Mi. per hr. basis. | Overtime per hour. |
|---|---|---|---|
| Passenger | $4.40 | 18 | .44 |
| Local freight, other than Mallet | 5.55 | 10 | .555 |
| Local freight, Mallet type | 6.50 | 10 | .65 |
| Through freight, other than Mallet | 5.20 | 10 | .52 |
| Through freight, Mallet engine | 6.15 | 10 | .615 |
| Yard engine, other than Mallet | 4.25 | 10 | .425 |
| Work train, other than Mallet | 4.40 | 10 | .44 |
| Mixed runs, other than Mallet | 5.55 | 10 | .555 |
| Mixed runs, Mallet Engine | 6.50 | 10 | .65 |
| Mine runs, other than Mallet | 5.55 | 10 | .555 |
| Mine runs, Mallet | 6.50 | 10 | .65 |

(Article 1, Transcript, p. 24.)

Overtime is paid on the "mile per hour basis" just set forth (Article 15, Transcript, p. 27) that is, in passenger service overtime is paid at the rate of 44 cents per hour for every hour in addition to what would have been required if the run had been made at an average speed of 18 miles per hour.

The first 30 minutes of overtime will be counted as one hour, and additional overtime for each succeeding hour will be allowed (Article 2, page 24).

## Firemen.

The schedule for firemen shows the following rates and methods :

| Class of Service. | Rates of pay. | Rate of overtime. |
|---|---|---|
| Passenger, 100 miles or less | $2.65 | $ .265 |
| Local freight, 10 hours or less | 3.55 | .355 |
| Through freight, 10 hours or less | 3.30 | .33 |
| Coal and mine run | 3.55 | .355 |
| Work trains | 2.70 | .27 |
| Switch engine | 2.50 | .25 |
| Through freight, Mallet engine, and work train 10 hours or less | 4.00 | .40 |
| Local freight, Mallet engine, 10 hours or less | 4.25 | .425 |
| Hostling, days, per month | 82.00 | |
| Hostling, nights, per month | 87.60 | |

Firemen's schedules, Article 1, Transcript, p. 38.

" When computing overtime, except when otherwise stated, the first thirty-one minutes shall be counted as one hour, and additional overtime for each succeeding hour will be allowed ".

## Pennsylvania.

### Conductors and Brakemen.

*Passenger.*

The pay is per day ($4.50 in the case of conductors) for less than 155 miles, and per mile (2.9c in the case of conductors) for 155 miles or over. As to "short turn arounds," overtime is computed on the "8hr.–12hr." rule. This "8 hour–12 hour" rule is widely employed on many railroads in computing overtime in "short turn-around" passenger service. In substance the rule is that the employee is paid overtime if either (*a*) his actual hours on duty during the day exceed eight, or (*b*) the time from his first reporting for duty until his final release from duty during the day exceeds 12 hours.

In all other passenger service, overtime is computed on the 20 mile speed basis.

But there is a very large number of special rates for runs of certain classes on particular parts of the system. Of these classes of runs, there are:

228 as to conductors;

110 as to baggagemen;

58 as to rear brakemen;

49 as to brakemen.

In all these classes a fixed amount is paid for the trip, and a fixed time limit is specified after which overtime will be paid. These runs vary greatly in length, in pay and in overtime limit. There is entire absence of any uniformity of speed basis. For example, on one part of the road 270.6 miles in length the brakemen are paid $4.72 for the trip, and are paid overtime after 14.18 hours. In a different class of runs on another part of the road 122 miles in length, the brakemen are paid for a trip of 122 miles $2.57 with overtime after 8 hours.

*Through and Other Freight Service.*

In through and irregular freight service these employees are paid per mile (in the case of conductors 4c.) and in local or way service they are paid somewhat more per mile (in the case of conductors 4½c.), " 100 miles or less, 10 hours or less," overtime being paid on the 10-mile speed basis.

There is a very large number of special rates for specified classes of runs on designated parts of the road :

45 as to conductors ;

115 as to flagmen ;

39 as to brakemen.

In these classes there is no general mileage rate or general speed basis, and overtime is allowed only after the time limit of the run.

For example, a conductor on local freight, the trip being only 24 miles, is paid $4.80 for the trip, with overtime after 12 hours (Schedule, p. 53). This is equivalent to a speed basis of 2 miles per hour. A brakeman on slow freight on a run of 142 miles is paid $3.59, with overtime after 12 hours, this being a speed basis of over 11 miles (Schedule, p. 51) ; a conductor on a through freight, having a run of 106.7 miles, is paid $4.48, with overtime after 12 hours, this being equivalent to a speed basis of a little less than 9 miles (Schedule, p. 69).

ENGINEERS.

*Passenger.*

In all classes of passenger service, engineers are paid $4.25 per day, or 4.25c per mile, " 100 miles or less will constitute a day," with overtime at 50c per hour. On " short turn arounds " the " 8hr.–12hr." rule applies. In all other passenger service overtime is on the 20 mile speed basis.

There is a very large number of classes of runs on desig-

nated parts of the road where specified trip rates are paid, not being based on any general mileage rate, and overtime not being paid on any general speed basis. There are 358 classes of these runs in passenger service.

*Through and Other Freight Service.*

In through freight service, engineers are paid, for Mallet engines, $5.85 per day, 5.85c per mile, and for all other classes $4.85 per day, 4.85c per mile, "100 miles or less, 10 hours or less, constitute a day."

In local freight service an additional 25c per 100 miles is paid.

In regular work, wreck and construction service, the pay is the same as local freight. In extra work, wreck and construction service, the pay is the same as through freight service.

It is also true in freight and analogous service that there is a large number of classes of runs on designated parts of the road which are paid for at specified rates for the trip, without reference to any general mileage rate or any general overtime basis. Of these classes of runs, there are:

346 in through freight;

257 in local freight;

83 in pusher service;

19 in miscellaneous service.

For example, in one class of through freight runs, having a mileage of 108 miles, the trip rate is $5.58, with overtime after 11¼ hours (Schedule, p. 25), being the equivalent of a speed basis of nearly 10 miles per hour; on another class of through freights, the run being 124.8 miles, the trip rate is $7.76, with overtime after 16 hours (Schedule, p. 25), being the equivalent of a speed basis of a little less that 8 miles per hour; on another class of through freights, the distance being 100 miles, the trip rate is $5.33, and the overtime limit is 11 hours (Schedule, p. 43), being equivalent to a speed basis

of 9 miles; on another class of local freights, the distance being 108 miles, the trip rate is $7.01, and the overtime is paid after 13½ hours (Schedule, p. 153), being equivalent to a speed basis of 8 miles per hour.

## Firemen.

### *Passenger.*

These employees have the right to have their pay for each run hereinbelow stated on the general methods, and also according to some older methods of compensation, and then have the option to elect to take whichever method will produce the higher compensation for the particular trip.

In passenger service the methods of compensating firemen are similar to those for compensating engineers. Here also we find a large class of runs on designated parts of the road where specified trip rates are paid without reference to any general mileage rate or speed basis.

There are 288 of these classes in passenger service.

### *Through and Other Freight Service.*

Methods for compensation are the same as for engineers. Here also there is a very large number of classes of runs on designated parts of the road where the compensation is by trip rates without regard to any general mileage rate or any general speed basis. In this category are:

320 classes of through freight runs;

190 classes of local freight runs;

60 classes of pusher runs;

28 classes of miscellaneous runs.

## Erie.

### Conductors and Brakemen.

*Passenger.*

These employees are paid fixed rates ($4.50 in the case of conductors) for 155 miles or less, and overtime is paid on the 20 mile speed basis, except on short turn around runs where the "8 hr.–12 hr." rule applies. Employees are guaranteed minimum amounts per month, being, in the case of conductors, $135.

On through runs between Jersey City and Buffalo, and Jersey City and Salamanca (being over 400 miles in length), these employees are paid on a separate basis, being, for conductors, 2.6c. per mile. This is in practice exclusively the mileage basis, since the 20 hour speed basis would produce no overtime until after 20 hours, and the Federal Sixteen Hour Law would prevent any runs taking that length of time. In the case of these runs, therefore, there is no time factor or speed basis which has any bearing upon the amount of pay.

On various branch lines, the pay is a fixed amount per day ($4.33 in the case of conductors) and additional mileage if more than 155 miles are made, but there is no provision for overtime on a speed basis or otherwise. The same is true on the Bradford Division, where payment is made for four round trips per day, and on runs between Salamanca and Cleveland, where 150 per cent. of a day's pay is given for each day.

On milk trains, these employees get fixed rates ($4.22 in the case of conductors) regardless of the mileage made, and are paid overtime after 10 hours.

*Freight.*

In through freight, these employees are paid a fixed amount (in the case of conductors $4.00), and in local freight a somewhat larger amount (in the case of conductors $4.50) for "100 miles or less, 10 hours or less", being a 10 mile speed basis, and the schedule provides that the company shall endeavor to give the employees the opportunity to make as much as 3,000 miles per month. Overtime is paid on a minute basis.

ENGINEERS.

*Passenger.*

In through passenger service, engineers are paid $4.25 per 100 miles or less, and overtime is paid on a 20 mile speed basis at 50c. per hour.

In suburban passenger service, the pay per 100 miles or less is the same, but overtime is not computed on a speed basis, but merely for the amount of delay after the schedule of the last trip, and also for all delay after 14 hours.

*Freight.*

In through and in local freight service the pay is per mile from 4.75 c. to 7 c., payment to be made for "100 miles or less, 10 hours or less," overtime being paid on the 10 mile speed basis.

FIREMEN.

In passenger and freight service the methods of reckoning compensation of firemen are similar to those for engineers. In helper service there is specific provision limiting hours of work to 6 on Mallet locomotives, except in cases of extreme necessity, and the pay for such service is $2.70 per day, "6 hours or less, 60 miles or less." In pusher or helper service, the rate is $4.50 per day "100 miles or less, 10 hours or less."

## Pittsburg and Lake Erie.

### Conductors.

*Passenger Service.*

There are a great many specified runs taking special rates varying from $4.73 to $8.10. For all runs not specified the rate is $4.73 for 136 miles or less; mileage in excess of 136 at 3.47c. per mile. Overtime is on speed basis of 20 miles an hour and is at the rate of 45c. an hour, but is not counted when under 30 minutes. There is a guarantee of $125 per month (pages 3, 4).

*Freight and Other Service.*

Most of the freight runs are also paid for at specified rates with various overtime limits, *e. g.*, 10, 12, 13, 14, 18, 20. The rates vary from $3.90 to $7.20. All runs not specified are paid at the rate of $3.90 for 100 miles or less, 10 hours or less. Overtime is paid after 10 hours at 40c. an hour. Local freight, work, construction and wrecking trains are paid fixed amounts for 100 miles or less, 10 hours or less, with overtime after 10 hours (pages 5, 6).

### Brakemen.

Brakemen in both freight and passenger service are paid on the same basis as conductors, but at different rates.

### Engineers.

*Passenger Service.*

$4.30 is paid for 100 miles or less, with excess mileage *pro rata* (Article 1). Overtime is on the speed basis of 20 miles an hour at the rate of 50c. an hour (page 21).

*Freight and Other Service.*

Most of the runs are specified with fixed rates. There are varying overtime limits, *e. g.* 10, 11, 12, 13, 14. Overtime is at the rate of 47½c. an hour (50c. on one run). $4.75 is paid for all unspecified runs. Overtime accrues after 10 hours at the rate of 47½c. an hour. Way freight runs are paid $5 with overtime after 10 hours (pages 1–2).

FIREMEN.

*Passenger Service.*

Firemen are paid $2.60 for 100 miles or less, with excess mileage *pro rata.*

*Freight Service.*

Most of the runs are specified with fixed rates and varying overtime limits substantially similar to the engineers basis (pages 1–2).

## Boston and Maine.

### Conductors and Brakemen.

*Passenger.*

The method of payment is per mile, for example, 2.9c. per mile for conductors, with varying mileage minima, *e. g.*, conductors, 155 miles, brakemen, 159 miles, flagmen, 162 miles and baggagemen, 166 miles. These employees are paid *both* for all miles in excess of their respective minima, and *also* for all hours in excess of 10 (Rule 22). It necessarily results that there is no speed basis, since overtime depends absolutely on time and not, as is usual, upon the rate at which mileage is made.

*Through Freight.*

The rate of payment is per mile "100 miles or less, 10 hours of less", the rate in the case of conductors being 4c. per mile. This, of couse, gives a speed basis of 10 miles per hour. If over 5 stops are made, the actual mileage is increased by 25 miles "constructive mileage".

*Local Freight Service.*

There are two distinct bases of payment, the crews having had the option of choosing the basis which should be used for the various runs. One basis is a payment per mile (in the case of conductors 4½c. per mile) "100 miles or less, 10 hours or less". The other basis is a payment of a fixed amount for the first 75 miles or less ($3.97 in the case of conductors) and an additional amount for each mile in excess of 75 miles (4.8c. per mile in the case of conductors). The speed basis for computing overtime is 10 miles per hour according to either of these methods of payment. If the train crew is

required to load or unload freight at more than 3 stops, local freight rates apply. Wreck train service is paid for according to the second of the local freight train methods of payment.

## Engineers.

### *Passenger.*

Engineers are paid 4.25c. per mile "100 miles or less, 5 hours or less" in through passenger service and "100 miles or less, 10 hours or less", in all other passenger service. In both instances, overtime is computed at 50c. per hour. This gives a speed basis of 20 miles per hour in through passenger service, and of 10 miles per hour in other passenger service.

### *Through and Other Freight Service.*

In through freight service, engineers are paid $4.75 for "100 miles or less, 10 hours or less," thus giving a speed basis of 10 miles per hour.

In local freight service, engineers are paid $5.00 for "75 miles or less, 10 hours or less." Although, on its face, this would indicate a speed basis of 7½ miles per hour, yet the agreed speed basis is 10 miles per hour.

The definition of what is a local freight train is not exactly the same for engineers, as it is for conductors and brakemen.

On certain runs which vary from 126 miles to 139 miles in length, engineers are paid for a flat mileage of 150 miles, and are given no overtime till after 14 hours. In effect, this means that on the 126 mile run the speed basis is 9 miles per hour, while on the run of 139 miles it is practically 10 miles per hour, but an additional payment is made through the constructive mileage, apparently in consideration of the low speed basis upon which overtime is computed.

## Firemen.

### *Passenger.*

Firemen are paid from $2.45 to $4.00 per day, "100 miles or less, 5 hours or less," thus giving a 20 mile speed basis, overtime rate 30 cents per hour. On short turn-around runs the "8 hr.—12 hr." rule applies. They have the choice, *as to each trip* of an alternative rate which, in some instances, may be higher, on a basis of "100 miles or less, 10 hours or less."

### *Through and Other Freight Service.*

Firemen, in through and other freight service, are paid from $2.75 to $4.00 per day, "100 miles or less, 10 hours or less," thus giving a 10 mile speed basis.

Firemen in local freight service are paid 15 cents additional. Their definition as to what is local freight service differs from that for conductors and brakemen, and from that for engineers. They also have in local freight service the choice of an alternative method by which they are paid a fixed amount for 75 miles or less, plus a mileage rate for mileage in excess of 75, but on a 10 mile speed basis.

On certain specified runs an arbitrary mileage of 150 miles is allowed, with overtime after 14 hours.

## New York, New Haven and Hartford.

### Conductors and Brakemen.

*Passenger.*

Rates of pay are so much per day ($4.50 per day in the case of conductors) for specified mileage or less, 10 hours or less, the specified mileages being 155 miles for conductors, 159 miles for brakemen, 162 miles for flagmen, and 166 miles for baggagemasters. Here also the employees are paid both for miles in excess of their mileage minima and for hours in excess of 10. These employees are guaranteed certain minimum wages per month, varying from $72.35 in the case of brakemen and flagmen to $125.00 in the case of conductors.

*Through and Other Freight Service.*

In through freight, these employees are paid a specified rate ($4.00 in the case of conductors for "100 miles or less, 10 hours or less"). This gives them a 10 mile speed basis, but the employees do not get paid both "for miles and for hours", as do the corresponding employees in passenger service.

Provisions are similar as to local freight service, except that the rates are somewhat higher, being $4.50 for conductors.

### Engineers.

*Passenger.*

In through passenger service, engineers are paid $4.25 per 100 miles or less, and have a speed basis of 20 miles per hour.

In other than through passenger service, engineers get the same rate for "100 miles or less, 10 hours or less" and are paid for both mileage in excess of 100 and hours in excess of 10, the overtime rate being 50c. per hour.

*Through and Other Freight.*

Engineers in through freight service are paid $4.75 for "100 miles or less, 10 hours or less" and in local freight service are paid on the same basis, but at the higher rate of $5. They are paid for both miles in excess of 100 and hours in excess of 10.

FIREMEN.

*Passenger.*

On this road, firemen have as to each trip the choice of two methods of payment, whichever produces the higher total. The one basis (known as the old basis) is 2.45c., "100 miles or less, 10 hours or less", with pay both for miles in excess of 100 miles, and hours in excess of 10; the other, or the "award" basis, is the same rate 100 miles or less on the 20 mile speed basis (except where the "8 hr-12 hr." rule applies).

*Freight.*

Firemen are paid according to the "old" basis, with varying rates for "100 miles or less, 10 hours or less", with pay both for miles in excess of 100, and time in excess of 10 hours; or according to the "award" basis, with varying rates, for "100 miles or less, 10 hours or less", overtime being paid only on the speed basis of 10 miles per hour.

## Chicago, Burlington and Quincy.

CONDUCTORS AND TRAINMEN.

*Passenger Service.*

The following minimum rates are paid: Conductors, $134.20, brakemen, $74.90 per month. There is a large number of tabulated runs on which there are special rates per month (Rule 2). Overtime is allowed on basis of 15 miles per hour, and paid at the rate per hour of 38.5c. for conductors, and 25.3c. for brakemen (Rule 6).

*Through and Irregular Freight Service.*

Conductors are paid 4.18c. per mile, brakemen, 2.78c. per mile; 100 miles or less, 10 hours or less to constitute a day, overtime *pro rata* (Rule 18). An arbitrary mileage allowance is made for 10 runs.

*Local Freight Service.*

Conductors are paid 4.75c, brakemen 3.25c. per mile; 100 miles or less, 10 hours or less to constitute a day.

However, 29 runs are tabulated, with rates on mileage, daily or monthly bases, and varying bases for calculating overtime, *e. g.*, after 11 hours, 30 minutes; after 8 hours, 30 minutes, westbound—8 hours, 10 minutes, east bound; after 10 hours, 5 minutes, westbound—8 hours, 25 minutes east bound; after 12 hours, 30 minutes; on basis of 11 miles per hour, etc., each run having its own qualifications (Rule 23). Overtime at regular way freight rates is paid way freight crews on monthly basis when schedule time is exceeded one hour.

*Mixed Service.*

57 runs in mixed train service and miscellaneous runs are tabulated with rates per mile, per hour, per day, or per month, some with overtime on passenger basis, 15 miles per hour ; some when scheduled time is exceeded one hour ; others after 10 hours or 12 hours.

8 others are tabulated, 5 of which are at regular local mileage rates ; 1 with overtime after 9 hours, 55 minutes, westbound, and 10 hours, 30 minutes eastbound ; 2 with overtime on basis of 11 miles per hour ; 2 with mileage allowed in excess of miles run and overtime calculated on basis of 11 miles per hour, figured on allowed mileage (Rule 27).

*Miscellaneous Service.*

Circus trains are allowed minimum of 16 hours, or 160 miles for each day assigned to circus train at through freight rates. If less than 16 hours are used in the last move, actual time is paid with a minimum of 100 miles (Rule 40).

In regular work train service, conductors are paid $113.85, and brakemen $75.90, per calendar working day month, 10 hours or less to constitute a day, overtime *pro rata*. When the total mileage made on any day amounts to more than ten hours, crew is paid on mileage basis at through freight rates (Rule 53).

Crews in wrecking service or temporary work or water train service are paid actual mileage going to and from the work, and by the hour while engaged at work, with a minimum of 100 miles or 10 hours at through freight rates (Rule 57).

## Engineers.

### *Passenger.*

Rates vary from $4.30 to $5.60 (according to locomotives) per day of 100 miles or less, 6¾ hours or less, miles in excess of 100 pro rata (pages 1–3).

On short turn-around runs, overtime is paid under the "8 hr.-12 hr." rule. All other passenger overtime on basis of 15 miles per hour. All passenger overtime paid at rate of 75 cents per hour (Rule 1).

### *Freight Service.*

Rates vary from $4.80 to $6.50 (according to class of engine) per day of 10 hours or less, or 100 miles or less; miles in excess of 100 pro rate. Overtime is computed on basis of 10 miles per hour, and paid pro rata. In local freight service 30 cents per 100 miles is added to through freight rates (Rule 7).

### *Work Train Service.*

In regular work train service, engineers are allowed full time, including Sundays, at through freight rates, 10 hours or less to constitute a day's work. In case the mileage made in any one day exceeds 100, mileage at through freight rates applies. (Rule 19.)

Through freight rates and rules as to mileage and overtime apply on all pusher or helper mine runs, circus trains, and milk trains. (Rule 20.)

### *Firemen.*

Firemen are paid on the same basis as engineers, the rates, of course, being different.

## Illinois Central.

### Engineers.

*Passenger Service.*

Rates vary from 4.3c. to 4.65c. per mile according to the class of locomotives (Article 1*a*). In all except suburban passenger service 100 miles or less constitute a day. Miles in excess of 100 *pro rata* (Art. 5).

Overtime on straightaway runs of 100 miles or more is computed on the speed basis of 20 miles and paid at the rate of 10 miles per hour, on the minute basis, at *pro rata* rate.

On short turnaround runs, no single trip of which exceeds 80 miles, overtime is paid under the 8 and 12 hour rule.

On turnaround runs the single trip of which is between 80 and 100 miles, overtime is computed on basis of 15 miles per hour for the total elapsed time. If released from duty at turnaround point, they are paid for 100 miles in each direction with overtime after 6 hours and 40 minutes.

All overtime in turnaround service is paid for on the minute basis at rate of 75c. per hour (Article 6).

Regular suburban passenger service at Chicago is entirely on a trip rate basis, these rates varying from 16c. to $2.50 per trip. Overtime allowed only at the end of the trip which terminates at the tie up point at night. Suburban service at New Orleans, $6 per day, 10 hours or less actual service, overtime *pro rata*. Irregular suburban service at Chicago, $4.40 per day of 10 hours or less, 100 miles or less (Articles 54, 55).

*Freight Service.*

Rates vary from 4.9c. to 5.45c. per mile according to the class of locomotives. In local freight service, rates at from 30 to 40c. per 100 miles higher than in other freight service (Article 1).

On runs of 100 miles or less, 100 miles are allowed, miles in excess of 100 *pro rata* (Article 5).

Overtime is computed on the basis of 10 miles per hour and paid on the minute basis (Article 6).

*Circus Trains.*

Engineers handling circus trains that stop to exhibit are paid 16 hours, or 160 miles, for each move, including loading and unloading of circus. If less than 16 hours are consumed in the last move, actual time will be paid, with a minimum of 100 miles (Art. 18).

*Wreck Trains.*

Engineers used for wrecking service are allowed actual mileage at through freight rates to and from place of wreck and are paid by the hour at freight rates for time at wreck; 100 miles or 10 hours to be the minimum paid for all service performed (Article 19).

FIREMEN.

*Passenger Service.*

Rates vary from 2.5c. to 3.0c. per mile (Art. 1). Overtime bases are same as engineers except that rate for overtime in turnaround service is 45c. per hour (Article 7). Trip rates in regular suburban service at Chicago vary from 10c. to $1.37 per trip; day rate at New Orleans is $3.60. Rate for irregular suburban service at Chicago is $2.70. Overtime rules same as for Engineers.

*Freight Service.*

Rates vary from 2.93c. to 3.75c. per mile (local freight rates being 30c. per 100 miles higher). Basis of day and overtime computation same as engineers (Articles 1 and 7).

Circus trains and wreck trains, same basis as engineers.

## Southern Pacific (Pacific System.)

### Conductors and Brakemen.

*Passenger.*

The rates of pay are per month, varying according to the division, *e. g.*, from $134.20 to $165.00, in the case of conductors, and from $92.95 to $104.05, in the case of brakemen (pages 1–11). These rates appear to be for regularly assigned service and do not specify the amount of mileage which must be made to cover the month's work. Overtime is paid on the basis of 15 miles per hour.

*Through and Other Freight Service and Work Train Service.*

In all these services also conductors and brakeman are paid monthly wages, varying according to the service and the division. For example, from $126.50 to $139.15 for conductors, and from $94.60 to $111.30 for brakemen. In through freight service (generally but not always), the schedule specifies the amount of mileage to constitute a month's work, varying from 2,250 to 3,700 miles, according to the division (pages 1–11).

Overtime for *regular* through freight train crews is to be calculated "on the basis of the card time of the train," and thus the specified speed basis varies with the time table speed of the particular train and is not governed by a specified speed basis of general application. Overtime for extra freights is to be based on the average of the longest and shortest through freight schedules in the same direction (page 13, par. 9).

Overtime for trainmen in assigned local freight and mixed train service will be computed on the basis of 10 hours, *except*

*that where crews get every third day layover, overtime will be computed on the basis of 12 hours* (page 13, par. 10). Thus, the speed basis in local freight service, the hours being fixed, varies with the length of the run of the train.

In work train service, 10 hours or less will constitute a day's work (page 13, par. 8).

## Denver & Rio Grande.

CONDUCTORS AND TRAINMEN.

*Passenger.*

On First Division, rate for regular assigned crews, Conductors, $165, brakemen, $98.39, with maximum mileage for month's work varying from 4,362 to 4,867 miles. Special and extra passenger crews, conductors $158.84; brakemen, $93.39; with maximum mileage of 4,500. Overtime on these runs is paid at an average speed of 22 miles per hour; on special trains, overtime is paid after 10 hours (page 3).

On the Second, Third and Fourth Divisions, conductors are paid either $158.84 or $165; Brakemen are paid $104.55; overtime on these divisions for regular trains is after train schedule; on special trains, overtime is paid after 10 hours (pages 4–6).

Overtime rates in passenger service, conductors, 47½c., brakemen, 35.6c.; less than thirty minutes not counted, thirty minutes and over as one hour (Art. 5).

*Mixed or Freight Service.*

In mixed or freight service, on First Division, one day's pay for conductors is $5.04. Brakemen, $3.41. This is per day of eight hours and 20 minutes.

On second, third and Fourth Divisions the rates are: conductors, $5.24, brakemen, $3.93, per day of 10 hours. These rates are paid for short runs in through and irregular freight, local freight, and mixed train service, for runs or trips not listed in pay schedule, provided that when miles made on runs not listed in pay schedule, equal or exceed mileage distance of the district on which the unscheduled run is made, the entire mileage is paid at district rates and time.

There are a great many runs listed in schedules at trip rates, with great variations and without basic rates per unit of miles or otherwise. For example: Pueblo to Salida, conductors are paid $5.04, with overtime after 8 hours; and again, with overtime after 9 hours applying to first section of train 53; while Pueblo to Salida local conductor is paid $137.60 per week-day month, with overtime after 10 hours (Page 7).

Again on the Pueblo to LaVeta run, the conductor is paid $5.04 with overtime after 8 hours, but if the return trip is made the conductor is paid $7.20 for round trip, with overtime after 6 hours in each direction; or if the round trip is made via the new line, he is paid $6.65 for the round trip, with overtime after 6 hours in each direction (Page 9).

Again on the Salida to Dunnison run, a conductor is paid $5.24, overtime after 10 hours; Salida to Alamosa he is paid $5.24, with overtime after 9 hours, and from Gunnison to Grand Jct. he is paid $6.56, with overtime after 12 hours, and Grand Jct. to Somerset and return, he is paid $9.08, with overtime after 16 hrs. and 35 minutes (pages 12 and 13).

In addition to the scheduled rates, there also appear what are known as District rates, such as the First Division, Conductors 5.04c. per mile; speed 5 minutes to the mile. On the First District of the 3rd Division, conductors, 7.09c. per mile; speed, 8.2 minutes per mile (Article 4).

These district rates are applied on the actual mileage, and when the mileage made on unscheduled runs equal or exceeds the district mileage as tabulated, then the district mileage rates and speed basis apply.

The trip rates and arbitrary time limits as tabulated have no fixed relation to any mileage unit or basic mileage day, but are determined by local conditions such as distance, gradient, and amount of work performed.

*Work Train Service.*

Regular work train service, conductors $142.17 and $148.35, depending on division, brakemen $98.90 per calendar month. Overtime, conductors 49 cents per hour; brakemen 37½ cents per hour; 10 hours or less to constitute a day. When mileage exceeds a day's pay, mileage will be allowed. Temporary work train service, crews are paid *pro rata* of district rates in running to and from their work and regular overtime for actual time worked, except when the pay for running to and from the work amounts to one day's pay, the allowance for work shall not commence until stated numbers of hours for a day's work on that district is exceeded (Article 17).

## Atlantic Coast Line.

### Conductors.

*Passenger Service.*

For runs of 155 miles and over the rate is 2.90c. per mile. For less than 155 miles $4.50 per day. There is a guarantee of $135 per month (Article 1). Overtime is paid on the speed basis of 20 miles an hour at the rate of 58c. an hour. On pay trains no overtime is allowed and on a few specified runs one hour of overtime is allowed daily (Art. 1, (*a*), (*b*) and (*c*); Art. 30).

*Freight and Other Service.*

In through freight and mixed service the rate is 4.10c. per mile, 100 miles or less to be paid as 100. In local freight the rate is 4.5c. per mile. Overtime is paid on the speed basis of 12 miles an hour for through freight and 10 miles an hour for local freight. The rates are 49c. an hour for through freight, 45c. for local freight. Work, construction and wrecking service is paid $4.50 a day; 100 miles or less, 10 hours or less to constitute a day.

In logging service the rate is $4.60 for 114 miles or less, with 4.10c. per mile for anything in excess. For circus trains the rate is $6.65 a day, 24 hours or less to constitute a day (Articles 2–5, 9).

There are special rates per day for 34 branch lines; for these runs time in excess of 12 hours is paid overtime at 36c. per hour (Article 34).

### Brakemen.

Brakemen are on substantially the same basis as conductors, except as to circus trains, where they are paid 133

miles at through freight rates for each move with overtime after 12 hours (Article 7).

### Engineers.

*Passenger Service.*

The rates are 4.25c. to 4.40c. per mile for 100 miles or less; over 100 miles, *pro rata*. A minimum of $5 per calendar day is paid whether earned or not (Article 1). Overtime is at the rate of 65c. per hour, on the speed basis of 20 miles an hour (Article 15). No overtime is paid engineers of pay trains.

*Freight and Other Service.*

In through freight service rates are per mile for 100 miles or less; miles in excess, *pro rata*. Overtime is on the speed basis of 12½ miles an hour. In local freight and work service the pay is also per mile, but at different rates; 100 miles or less, 10 hours or less constitute a day. Overtime is paid on the speed basis of 10 miles an hour, less than 30 minutes not counted. On mine extras there is still a different rate per mile for 100 miles or less, with overtime after 10 hours (Articles 2, 4, 15).

On 30 branch lines there are fixed rates per day with overtime after 12 hours (Article 53).

## Louisville and Nashville.

### Conductors.

*Passenger.*

For runs of less than 155 miles the pay is $4.50 per day; for over 155 miles, 2.9 cents per mile. There is a guarantee of $135 per month. Overtime is, on the speed basis of 20 miles an hour, at the rate of 46 cents per hour, less than 30 minutes not counted (Articles 1, 13).

*Freight and Other Service.*

Freight and other service are paid at different rates per mile, 100 miles or less to be paid as 100 (Articles 2, 3).

In work, construction and wrecking train service the pay is also at a certain rate per mile, 100 miles or less, 10 hours or less, to constitute a day's work (Article 4). Overtime is at the rate of 45 cents per hour, on the speed basis of 11 miles for through freight and mixed and ten miles an hour for local freight (Article 13). There are about 220 excepted runs, mostly paid by the month, for a specified number of trips per month, although a few are by the trip. On these runs overtime accrues after various limits, for example, 3, 8, 9½, 10½, 12 and 15 hours, or "after schedule has been exceeded one hour and a half"; and the number of required trips varies greatly. There are 15 local freight runs, each of which is supposed to be made 17.39 times per month. As to these runs overtime accrues after 15 hours. The pay for these runs is $125 per month (pages 20–63).

### Brakemen.

Brakemen are paid on substantially the same basis as conductors.

## Engineers and Firemen.

### *Passenger.*

The rate of pay is $4.25 per 100 miles or less; over 100 miles *pro rata*. When unable to earn $5.00 per calendar day, that amount will be paid in any event (Articles 1, 2). Overtime accrues if the train is delayed 30 minutes beyond its schedule; on certain runs, if the delay is one hour. Extra passenger trains are on the speed basis of 20 miles an hour. Overtime rate is 65c. per hour in every case (Article 13).

### *Freight and other service.*

Through and local freight service is on the basis of a fixed amount per 100 miles or less; over 100 miles *pro rata*. In through freight service, overtime is on the speed basis of 12½ miles an hour (with exceptions in many cases as to the first hour of overtime); in local freight service, the basis is 10 miles an hour (Articles 3, 4).

In work train, mine run and helper service, the pay is per day, 100 miles or less, 10 hours or less to constitute a day; except in helper service, where 12 hours or less constitute a day (Articles 5–7).

There are a great many specified runs which earn fixed pay per trip. There is a wide variation in the mileage on the different runs, and also in the overtime bases. For instance, 6½, 10, 12, 9, 3, 10⅓, 10½, 10⅔ and 12½ hours. These varying overtime bases produce equally wide variations in the speed basis for the different runs. There are local freight runs on 13 divisions having three crews assigned to the run. The pay for these runs is per month, with overtime after 14 hours; in one case, 15 hours (pages 27–63).

## Firemen.

Firemen are practically on the same basis as engineers, although the rates are different.

## Southern Railway.

### Conductors.

*Passenger.*

The rates are $4.50 per day for less than 155 miles; 2.90 cents per mile for 155 miles or over (page 1). There is a monthly guarantee of $135.00. Overtime is paid on a 20 mile speed basis at the rate of 58 cents per hour (Rule 19).

*Freight and Other Service.*

The through freight rate is 4.10 cents per mile; local freight, 4.5 cents per mile, 100 miles or less to be paid as 100 miles. Local freight crews are guaranteed 100 miles for each working day (pages 3, 4).

Work, construction, wrecking and mine run services are also paid different rates per mile, 100 miles or less, 10 hours or less to constitute a day's work (pages 5, 6).

In helper service, the pay is $4.96 per day, 12 hours or less to constitute a day's work.

Overtime is paid on an 11 mile speed basis for through freight, and on a 10 mile speed basis for local freight, and after 10 hours for work, construction and wrecking service (page 6 and Rule 19).

Circus trains are allowed 133 miles at through freight rates for each month; overtime is paid after 12 hours (Rule 4).

There are numerous excepted runs, both passenger and freight, paid at trip rates. In different cases, overtime is paid after 10, 11, 12, 13 and 15 hours, respectively. In one case there is a monthly rate and no overtime is paid (pages 7–19).

### Brakemen.

Brakemen are on the same basis as conductors, but at lower rates.

## Engineers.

### *Passenger.*

Engineers are paid 4.25c. to 4.40c. per mile, according to engine, and are allowed $5.15 a day if sufficient mileage to produce this amount is not made within 12 hours (page 3). Overtime is on the speed basis of 20 miles an hour, at the rate of 60c. per hour (Rule 26).

### *Freight and Other Service.*

The rates are 5.15 to 6.25c. per mile in through freight and mixed service, and 5.75 to 6c. per mile in local freight service; runs of 100 miles or less to be paid as 100 miles. Overtime in through freight is on the speed basis of 11 miles an hour, and in local freight on the basis of 10 miles an hour. The rates for both classes are 60c. an hour, irrespective of the class of engine (Pages 4–5, 9).

Work train and mine run service is paid per mile, 100 miles or less, 10 hours or less, to constitute aday's work. Helper service is paid by the day, 12 hours or less, 100 miles or less, to constitute a day; miles in excess of 100 *pro rata.* When more than 100 miles are made, overtime is computed on the speed basis of 8½ miles an hour (Pages 6–7).

Circus trains are allowed 133 miles at through freight rates for each move, with overtime after 12 hours (Rule 4).

There are numerous excepted runs. Some of these are paid by the trip; some by the day, and some by the month. Overtime is allowed, in some cases, after 10 hours, in some after 11 hours, and in some after 12 hours. On one specified run, no overtime is allowed (Pages 10–19).

## Firemen.

Firemen are on the same basis as engineers, but at lower rates.

## Atchison, Topeka and Santa Fe—East and West.

CONDUCTORS AND BRAKEMEN.

*Passenger.*

Pay is on a monthly basis for conductors varying according to divisions from $134.20 to $140.36 per month for less than 4,000 miles and from $165. to $171.16 per month for more than 4,000 miles. For brakemen from $74.91 to $87.23 for less than 4,000 miles and from $81.07 to $93.39 for more than 4,000 miles. The maximum monthly mileage is 6,000, (one division 5,500), except on limited trains where it is 7,000 (one division 6,500). Payment is made *pro rata* for excess mileage or sufficient time off allowed to bring the work within the maximum. Overtime is paid at 38.5 cents per hour for conductors and 25.3 cents for brakemen on a 15 mile per hour speed basis. If extra trips are made, payment is made on a mileage basis with the minimum allowance of 165 miles where service is not continuous, and where service is continuous a minimum of 20 miles per hour is allowed. On certain local and mixed runs monthly compensation is paid, calendar working days to constitute a month's work, 10 hours or less a day's work. On these runs overtime is paid *pro rata* after 10 hours. (Article 1.)

*Freight Service.*

In local and mixed freight service payment ranges from $125.53 to $153.06 per month for conductors and from $83.49 to $104.37 per month for brakemen, according to divisions. Ten hours constitute a day's work, except where there are three crews to a run, having a lay-over day; in such case 12 hours constitutes a day's work. Overtime is paid *pro rata*. Through freight is on a mile-

age basis, the rates being 4.18 cents to 5.10 cents per mile for conductors and 2.78 cents to 3.70 cents per mile for brakemen ; 100 miles or less, or 10 hours or less, constitute a day's work, with overtime *pro rata* where runs of less than 100 miles take more than ten hours and for longer runs on a 10-mile per hour speed basis. Work-train service is paid by the month, calendar working days to constitute a month ; 10 hours or less constitute a day's work. Overtime is paid *pro rata* after 10 hours. On turn-around runs between terminals, more than 50 and less than 100 miles apart, actnal miles run or hours worked are paid if the trip is completed within 16 hours. If not completed within 16 hours, 200 miles are paid, and if more than 20 hours are actually worked, overtime is paid for the excess (Articles 3, 4, 5 and 10).

## Atchison, Topeka and Santa Fe-Coast Lines.

CONDUCTORS AND BRAKEMEN.

*Passenger.*

Conductors are paid from $146.52 to $171.16 according to division for monthly mileage from 4,000 to 6,000, except on limited trains where the maximum monthly mileage is 7,000. Brakemen receive from $93.39 to $99.55 for similar service. Excess miles are paid *pro rata* or sufficient time off is allowed to bring the month's work within the maximum mileage. Overtime is paid at 38.5 cents per hour for conductors and 25.3 cents for brakemen on a speed basis of 15 miles per hour (Article 1).

*Freight Service.*

Through freight is paid mileage rates, 100 miles or less, 10 hours or less, to constitute a day. Overtime is paid *pro rata* on a 10 mile per hour basis, except on two divisions where the basis is 12 miles per hour on runs of 100 miles or more. Local freight is paid on a monthly basis, 26 or 27 days to the month, 100 miles or less, 10 hours or less to constitute a day. Overtime is paid *pro rata* on a 10 miles per hour speed basis. Work and mixed train service are paid on the same basis as local freight but at different rates. In through freight service brakemen are paid a smaller rate per mile for mileage in excess of 3,000 than for the first 3,000 miles (Articles 2–4).

## Gulf, Colorado and Santa Fe.

CONDUCTORS AND BRAKEMEN.

*Passenger.*

Conductors are paid $165 per month for runs of 4,000 to 6,000 miles and $134.20 per month for runs of less than 4,000 miles. Corresponding pay for brakemen is $74.91 and $81.07. Mileage in excess of 6,000 is paid *pro rata*. Overtime is paid at the rate of 38.5 cents per hour for conductors and 25.3 cents per hour for brakemen on a speed basis of 20 miles per hour. On branch lines the pay is for a month of calendar working days, 100 miles or less, 10 hours or less, to constitute a day's work; overtime *pro rata* on a 10 mile per hour speed basis (Article 1).

*Freight Service.*

Through freight is on a mileage basis, 100 miles or less, 10 hours or less, to constitute a day's work; overtime on a 10 mile speed basis at *pro rata* rates. Local freight service is paid per month of calendar working days, 100 miles or less, 10 hours or less, to constitute a day's work; overtime *pro rata* on a 10 mile speed basis. Less than 30 minutes of overtime is not counted in any service. On turn-around runs if the distance one way is between 20 and 50 miles, 100 miles will be allowed if the crew is not used again within 10 hours. If more than 100 miles are made, actual mileage is allowed. Where the distance one way is between 50 and 100 miles, 200 miles will be allowed if the turn-around trip consumes 16 hours (Articles 1, 3).

## Chicago, Milwaukee & St. Paul.

### Conductors and Brakemen.

*Passenger Service.*

Conductors are paid $165 per month, brakemen $68.75 per month, (in one instance $74.91), for specified runs for which the monthly mileage varies from 4,000 to 7,750. Mileage in excess of the monthly maximum is paid at the rate of 3.13 cents per mile. The same rates apply to short runs averaging more than 133 miles per day. On runs of less than 133 miles per day the monthly pay is $121.88. Overtime is paid at the rate of 39 cents per hour for conductors and 25 cents per hour for brakemen on a speed basis of 15 miles per hour (Article I.).

*Freight and Work Train Service.*

Through freight conductors $4.18, brakemen $2.78 per hundred miles. Way freight conductors $4.52, brakemen $3.14 per hundred miles. Work train conductors $4.18, brakemen $2.78 per hundred miles. Excess mileage *pro rata*. 100 miles or less, 10 hours or less, constitute a day's work, and overtime is paid *pro rata*. Certain branch line runs are paid various monthly or daily rates irrespective of mileage, with overtime paid after 10 hours (Article II.).

### Engineers.

*Passenger Service.*

Rates are from $4.20 to $5.90 according to the class of engines for 100 miles or less, 6⅔ hours or less, excess miles *pro rata*. On short turnaround runs the "8 hr.—12 hr."

rule applies. All other passenger overtime is on a speed basis of 15 miles per hour and is paid 75 cents per hour (Articles I. and II.).

*Through and Other Freight Service.*

Through freight engineers are paid $4.60 to $6.50 for 100 miles or less, 10 hours or less, excess miles *pro rata.* Overtime is paid at *pro rata* rates on the speed basis of 10 miles per hour. Way freight rates are 30 cents per 100 miles in excess of through freight rates (Articles I. and III.).

*Work Train Service.*

On the same basis as through freight 100 miles or less, 10 hours or less, constitnte a day, with overtime computed on the speed basis of 10 miles per hour. Engineers assigned to regular work service will be allowed 100 miles for each calendar day, whether worked or not, except when staying at home terminals and notified one hour prior to the time of beginning work (Article VIII.).

FIREMEN.

Firemen's pay is computed in the same way as engineer's pay, although the rates, of course, are different, being from $2.65 to $4 for passenger, $2.80 to $4.25 for through freight, and $3.10 to $4.55 for way freight (Article I.).

## Chesapeake and Ohio.

### Conductors.

*Passenger.*

The rate is $4.50 per day for less than 155 miles; 155 miles or over, 2.9c. per mile. There is a monthly guarantee of $135.00. In main line service, overtime is based on the schedule of the train; in branch line service, overtime accrues fater 10 consecutive hours; the rate is 40c. per hour (Article 1, paragraphs 1, 2, 11, 12, 13).

*Freight and Other Service.*

In through freight service, the rate is 4.10c. per mile; 100 miles or less to be paid as 100. In local freight service, the rate is 4.50c. per mile, 100 miles or less, 9 hours, 5 minutes or less, to constitute a day. Overtime for both classes is on the basis of 11 miles an hour for main line runs, and of 10 miles an hour for branch line runs (Articles 2, 3).

There are a number of specified runs of more than 100 miles, on which there is a higher speed basis (Article 5).

### Brakemen.

Brakemen in freight and passenger service are on the same basis as conductors.

### Engineers.

*Passenger.*

The rate is 4.25c. per mile, 100 miles or less to constitute a day. There are, however, a large number of specified runs which are paid various fixed amounts per month, or per day of 10 hours. Many of the runs are at constructive mileage. Overtime is allowed when the schedule time of the train is ex-

ceeded by 61 minutes or more; except that, in Indiana, overtime is on a 20 mile an hour speed basis (Articles 1, 2 and 4).

*Freight and Other Service.*

Freight service is at the rate of 5.25c. per mile (6.25c. per Mallets), 100 miles or less to constitute a day. Overtime is on the speed basis of 11 miles per hour. On many divisions, constructive mileage is allowed. There are a number of specified runs taking fixed rates per month, or per day of 10 hours.

Work trains and helpers take the rate of $5 per day of 10 hours or less.

FIREMEN.

*Passenger.*

The rate is $2.45 to $4.00 per day (according to engine), 10 hours or less, 100 miles or less to constitute a day. Overtime is allowed when the schedule time has been exceeded by 61 minutes; the overtime rate is 30c. an hour. In Indiana, overtime is on the speed basis of 20 miles per hour.

There are a number of specified runs paid fixed rates per month, for 10, 11 or 12 hours a day in different cases. Sometimes the schedule time of the train constitutes a day. Constructive mileage is allowed in many cases. On runs of more than 132 miles, overtime is paid only after 12 hours.

*Freight and Other Service.*

The rates are from $2.75 to $4.00 per day for through freight (local freight 25c. higher), 9 hours and 5 minutes or less, 100 miles or less to constitute a day, in through freight and wreck service; 10 hours in local service. Overtime varies from 30c. to 44c. per hour. On runs of more than 132 miles, overtime is paid after 12 hours. There are a number of specified runs taking fixed monthly rates for days of 10, 11 and 12 hours in different cases.

## Northern Pacific.

### Conductors and Brakemen.

*Passenger.*

Conductors and brakemen are paid by the month for a specified number of trips per day or per month. The pay is conductors $146.52 to $165, brakemen $86.57. The monthly mileage varies from 2040 to 6600 miles, but all mileage over 5500 is paid extra at the rate of 3.3 cents per mile for conductors and 1.73 cents per mile for brakemen. Overtime is based on the schedule of time of the train, except in certain specified runs where overtime is paid after 10 hours. Overtime is only paid, however, for the time by which the preliminary time on duty and the time late on arrival exceeds 1½ hours. The rates of overtime are 55 cents per hour for conductors and 29 cents per hour for brakemen, but overtime will not be paid to exceed 10 hours in any day unless extra work is done. (Article I., Rules 1, 2 and 10; Article I., Rules 1, 2 and 9).

*Freight and Other Service.*

Pay for mixed trains, through and local freight, and work trains is on a daily basis with different rates for the different services. 100 miles or less, 10 hours or less, constitute a day. Overtime is paid *pro rata* when the time for runs of 100 miles exceeds 10 hours and for longer runs, on a 10 mile per hour speed basis. Through freight trainmen are guaranteed 3,000 miles per month. Trainmen on circus and theatre trains that stop to exhibit are paid for 16 hours or 160 miles for each move. On certain specified freight runs the pay is on a mileage basis between certain points and on a time basis between other

points. (Articles II., III., IV. V. and Article X., Rule 21; Articles II., III., IV., V., and Article X., Rule 21).

### Engineers.

Engineers are paid from $4.40 to $5.90 for 100 miles or less in passenger service and from $4.80 to $6.50 in through freight service, local freight being 10 per cent. higher than through freight. Mountain helpers are paid $2.40 to $3.25 per trip of five hours or less. In passenger service 100 miles or less, 6¾ hours or less, constitute a minimum day's work. Mileage in excess of 100 is paid *pro rata*. Overtime is paid on a basis of 15 miles per hour and at the rate of 75 cents per hour. In suburban passenger service and short turn-around runs the speed basis is 10 miles per hour. In all other service 100 miles or less, 10 hours or less, constitute a day's work. Overtime is paid *pro rata* when the time for 100 miles or less exceeds 10 hours and for longer runs in proportion (Rules 1, 2, 3, 29, 30, 31 and 54).

### Firemen.

The pay of firemen is figured in the same way as the pay of engineers, the rates being as follows: Passenger, $2.55 to $4.00; through freight, $2.95 to $4.25; local freight 10% higher than through freight (Rules 1, 2, 3, 29, 30, 31 and 54).

## SUMMARIES OF SCHEDULES DESIGNATED BY APPELLANT.

### El Paso & Southwestern.

CONDUCTORS AND BRAKEMEN.

*Passenger.*

Conductors are paid $176 a month, with overtime at the rate of 44 cents per hour, commencing one hour after the schedule time of arrival at the terminals. Three crews are assigned to each separate run and the maximum monthly mileage is 5,753 on the Eastern Division and 5,982 on the Western Division. Mileage in excess of these maxima is paid for per mile. Conductors working less than a full month are paid at the rate of $3.056 per 100 miles.

*Freight.*

Freight service is paid at the rate of $4.6383 per 100 miles on the Eastern Division and 4.84 cents per mile on the Western Division, less than 100 miles being paid as 100 miles. Overtime is on a speed basis of 12½ miles per hour. Work service is paid for on the basis of the calendar working day month, 10 hours or less constituting a day.

There are two branches on which all service is paid at a higher monthly rate, with overtime accruing after 12 hours, and one branch where overtime accrues after 11 hours.

Brakemen in both freight and passenger service are paid on the same basis as conductors, but at different rates.

ENGINEERS.

*Passenger.*

$4.40 to $5.53 for 100 miles or less; excess mileage *pro rata*. On runs of less than 100 miles, overtime is paid after 5 hours; on longer runs, at the 20 mile speed basis, 12½ miles pay is given for each hour of overtime. On short runs, the

singles of which are less than 100 miles, actual mileage and overtime are paid when the run is completed in less than 8 hours; if more than 8 hours are consumed, 200 miles will be paid.

*Freight and Other Service.*

The through freight rates are $5.53 to $6.60 per 100 miles or less, with excess *pro rata*. On runs of less than 100 miles, overtime is paid after 8 hours; on longer runs, on the 12½ mile speed basis. Local freight takes the rate of 30c. per 100 miles higher than through freight.

In work service, the pay is $166.30 a month of 26 working days, 12 hours a day. Overtime *pro rata* after 12 hours. In helper service, the pay is $5.40 per day of 12 hours or less, with overtime after 12 hours, at road rates.

On three branch lines, $212.00 a month is paid for all classes of service, with overtime after 12 hours at *pro rata* rates. On one branch, payment is made for actual mileage, with overtime according to the schedule of the train for each trip.

FIREMEN.

Firemen are on the same general basis as engineers, but at lower rates.

## Galveston, Harrisburg and San Antonio.*

CONDUCTORS.

*Passenger.*

$165.00 per month is paid for specified runs, the monthly mileage of which varies from 3,600 to 6,000 miles. Additional mileage is paid *pro rata*. On one run, the rate is $146.52 a month for one round trip daily. Overtime is paid when the schedule time has been exceeded by 30 minutes, the schedule time being from 25 to 35 miles per hour. In irregular service, the minimum day's pay is $\frac{1}{30}$ of the monthly pay, but if the day's mileage exceeds $\frac{1}{30}$ of the monthly mileage, the excess is paid *pro rata*. In this service, overtime is paid after 6 hours, except in two districts where overtime is paid after 5 hours (Article 1, Sections 3, 5).

*Freight and Other Service.*

Various through freight runs are paid rates of 4.18c. to 4.48c. per mile, with a guaranteed mileage of 3,000 per month. Overtime is computed according to the schedule time of the train, but in no case is the basis less than 12 miles an hour, and it runs from 12 up to 14.7 miles an hour on different schedules. One run is allowed 150 miles and the actual schedule time is 10 hours, but overtime is not paid until after 12 hours. In local freight service, monthly rates of from $95.34 to $147.78 are paid for specified runs. On most of these runs, 26 and 27 trips a month are to be made, but in some cases 20 or less runs are to be made. Overtime is paid after 10 hours, or if the run is more than 100 miles, on the 10 mile an hour basis (Article 3, Section 4).

There are a number of branch line runs of all classes paid monthly rates; in some cases maximum mileage constitutes a month's work; in other cases, a certain number of days con-

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* Part of what was formerly known as the Southern Pacific-Atlantic System.

stitutes a month's work. Overtime is paid either after 10 hours, or according to the schedule time of the train. In one case, overtime is paid after 10 hours and 24 minutes; in two other cases, after 10 hours and 48 minutes. In work or construction service, the pay is by the month of 26 days or less, with 10 hours or less to constitute a day's work. Overtime is paid after 10 hours (Articles 5, 6).

### Brakemen.

Brakemen are on the same basis as conductors, but at lower rates.

### Engineers.

#### *Passenger.*

There are 24 runs at various trip rates, with a minimum of $4.30 per 100 miles, 6 hours and 40 minutes or less to constitute a day. Overtime is constituted on the basis of 15 miles an hour, at 75c. per hour. In short turn around service, the "8hr.-12hr." rule applies (Articles 1, 2).

#### *Freight and other Service.*

In through freight service, the rate is $4.75 to $6.50 per 100 miles or less, 10 hours or less to constitute a day's work. Mileage in excess of 100 is paid *pro rata*. Overtime is computed on the 10 mile speed basis. In local freight the rate is 30c. per 100 miles more than through freight (Article 3).

### Firemen.

Firemen are on the same basis as engineers, but at lower rates.

## Houston and Texas Central.*

### Conductors.

*Passenger.*

There are seven specific runs taking monthly rates of from $146.52 to $165.00. Overtime is on the basis of 15 miles an hour, at the rate of 38.5c. per hour (Rule 1).

*Freight and Other Service.*

Through freight is paid $4.18 per 100 miles or less. Overtime is on the basis of 12½ miles an hour, at 52c. per hour. Local freight is paid $139.15 per month, 10 hours or less to constitute a day's work. Overtime is paid *pro rata*. There are 4 mixed runs, taking agreed monthly rates, with overtime *pro rata* after 10 hours work. In work and construction service, the pay is $113.85 a month, calendar working days of 10 hours or less to constitute a month's work. Overtime after 10 hours is paid at through freight rates (Rules 2–5).

### Brakemen.

Brakemen are on the same basis as conductors, but at lower rates.

### Engineers.

*Passenger.*

$4.30 a day and upwards (according to engine) are paid, 100 miles or less to constitute a day. Overtime is on the speed basis of 22 miles an hour. In short turn around service, the "8hr.-12hr." rule applies (Article 9).

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* Part of what was formerly known as the Southern Pacific-Atlantic System.

*Freight and Other Service.*

In through freight the rate is $4.20 per day and upwards (according to engine), 100 miles or less, 8 hours or less to constitute a day. Overtime is on the basis of 12½ miles an hour. Local freight service is paid 30c. a 100 miles more than through freight. In work train service, $4.40 per day and upwards is paid for 100 miles or less, 10 hours or less. Overtime is paid *pro rata* after 10 hours, or where the run exceed 100 miles, on the basis of 10 miles an hour. Circus trains are paid 200 miles at through freight rates for each move, with no overtime (Articles 4, 5).

FIREMEN.

Firemen are on the same basis as engineers, but at lower rates.

## Houston, East and West Texas.*

### Conductors.

*Passenger.*

$165 per month is paid for 4872 miles or less; excess mileage *pro rata*. Overtime is on the speed basis of 15 miles per hour, at 38.5c. per hour (Rule 1).

*Freight and Other Service.*

Through freight is paid 4.17c. per mile for 3,000 miles or less a month. Overtime is on a 12 mile speed basis, at the rate of 50.6c. per hour. In local freight and mixed service, the pay is $139.15 and $155.85 a month, respectively, with overtime after 10 hours. In local freight service, when three crews are employed, they are to work full calendar days, and when two crews are employed, 26 or 27 days will constitute a month's work. In work and construction service, the pay is $113.85 a month, with overtime after 10 hours, at through freight rates; calendar working days of 10 hours or less will constitute a month's work. Circus trains are guaranteed 200 miles for each move at through freight rates, but are not paid overtime (Rules 3-5).

### Brakemen.

Brakemen are on the same basis as conductors, but at lower rates.

### Engineers.

*Passenger.*

Engineers are paid $4.15 and $4.40 per day, 100 miles or less to constitute a day. Overtime is paid when the schedule

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* Part of what was formerly known as the Southern Pacific-Atlantic System.

time of the train is exceeded. On irregular trains overtime is on the speed basis of 22 miles an hour. The overtime rate is 55c. an hour. On irregular mixed trains the overtime is on the basis of 18 miles an hour (Article 5).

*Freight and Other Service.*

Through freight is paid $4.90 per day and upwards (according to engine), 100 miles or less to constitute a day's work. Excess mileage is paid *pro rata*. Overtime is on the speed basis of 12½ miles an hour, at 55c. per hour. In local freight service the rate is 30c. a 100 miles more than through freight service. Overtime is on the basis of 12½ miles an hour. Circus trains are paid 200 miles at through freight rates for each move, but no overtime is allowed. In work, pusher and helper service, the rates are the same as through freight service, 10 hours or less to constitute a day. Overtime is on the basis of 10 miles an hour (Articles 4, 5).

## International and Great Northern.

### Conductors and Brakemen.

*Passenger.*

Regular conductors are paid $165. Extra conductors are paid for mileage, with 183 miles or less to constitute a day's work, and excess is paid *pro rata*. Overtime is paid according to the schedule time of the trains at the rate of 38.5c. an hour (Article 2).

*Freight and Other Service.*

Through and mixed freight service are paid at the rate of $4.18 per 100 miles or less, 10 hours or less to constitute a day's work. Overtime is paid on the speed basis of 10 miles per hour at the rate of 41.8c. per hour. Local freight and mine run service is paid $139.15 per calendar work day month. 10 hours or less constitutes a day's work. Overtime is paid after 10 hours at the rate of 53.9c. per hour. On runs of over 115 miles, three crews are assigned. Overtime, however, still accrues after 10 hours.

In work train service the pay is $4.56 per day. 100 miles or less, 10 hours or less, constitute a day's work. Overtime after 10 hours *pro rata*.

On branch lines the pay is by the month, with 10 hours or less constituting a day's work, and overtime pro rata after 10 hours (Articles 3, 5–7, 42).

### Brakemen.

Brakemen in both passenger and freight service are paid on the same basis as conductors, but at different rates.

## Engineers.

### *Passenger.*

The pay is $4.30 to $4.45 according to engine for 100 miles or less; excess, *pro rata*. Overtime is based on the schedule time of the trains and is paid at the rate of 50c. per hour. Overtime for detoured passenger trains is on the speed basis of 25 miles per hour (Articles 4 and 8).

### *Freight and Other Service.*

Through freight is paid $4.95 to $5.40 for 100 miles or less, with excess *pro rata*. Overtime is on the 10 mile an hour speed basis and is paid at the rate of 49.5c. to 54c. per hour.

Local freight is paid 35c. per 100 miles more than through freight rates.

Work and pusher service are paid through freight rates 100 miles or less, 10 hours constituting a day's work. Overtime is paid *pro rata* on a 10 mile an hour speed basis.

Circus trains are paid at through freight rates with a minimum of 150 miles for each move (Articles 4, 6 and 11).

## Firemen.

Firemen are paid on the same basis as engineers but at lower rates.

## Central of Georgia.

CONDUCTORS AND BRAKEMEN.

*Passenger.*

Rates are $4.50 per day for runs less than 155 miles, 2.9c. per mile for runs of 155 miles and over. There is a monthly guarantee of $135. Overtime is paid if the trip consumes one hour and thirty-five minutes more than schedule time. The overtime rate is 63c. per hour (p. 1, Article 13).

*Freight and Other Service.*

Through freight service is paid 4.1c. per mile, 100 miles or less to be paid as 100. Overtime is on the speed basis of 12½ miles an hour at the rate of 51c. per hour.

In local freight service, the rate is 4.5c. a mile, 100 miles or less to be paid as 100. 10 hours constitute a day's work, and overtime is paid on a mile an hour speed basis, at the rate of 45c. an hour.

For work, construction and wreck trains, the pay is $4.50 a day, 100 miles or less, 10 hours or less to constitute a day's work. Overtime or excess mileage is paid *pro rata*.

Circus trains are allowed 133 miles at through freight rates, for each move. Overtime is paid after 12 hours.

There are a number of excepted runs which are paid on a daily or monthly basis, with variations as to what constitutes a days's work, *e. g.*, 2 round trips. 3 round trips within 14 hours or less, 12 hours or less, 11 hours or less, etc. (pp. 3–5, Articles 28–42).

Brakemen are on substantially the same basis as conductors, except that in passenger service brakemen are paid overtime on a 20 mile an hour speed basis.

## Engineers.

### *Passenger.*

Rates are 4.25c. to 4.40c. per mile, with a minimum of $5.00 per day, except where the actual mileage will produce an average of $5.00 per day, in which case straight mileage is paid. Overtime is paid at the rate of 75c. per hour, on a speed basis of 20 miles an hour (Article 1).

### *Freight and Other Service.*

In through freight and mixed service, the rates are $5.15 to $5.40 for 100 miles or less. Overtime is paid at the rate of 65c. to 69c. an hour on a 12½ mile speed basis.

On turn around runs actual mileage is paid, unless there is detention at the turning point for 5 hours or more, in which case 100 miles each way will be allowed on the basis of 8 hours to the hundred miles.

In local freight service, the rate is 5.75c. per mile, 100 miles or less to be paid as 100, and 10 hours to constitute one day's work. Overtime is paid at the rate of 60c. an hour on a 10 mile speed basis.

Work and wreck trains are paid by the day, 100 miles or less, 10 hours or less to constitute a day, with *pro rata* overtime.

There are a number of excepted runs paying different rates per day; on most of these, either 12 or 11 hours constitute a day's work. There is one trip on which 14 hours constitute a day's work (Articles 2–4, 16–21, 10).

## Firemen.

There is no agreement with the fireman.

## Florida East Coast.

### Conductors and Brakemen.

*Passenger.*

155 miles or over, 2.9c. per mile; less than 155 miles $4.50 per day, with a guarantee of $135 per month in addition to any overtime. Overtime is paid on a speed basis of 20 miles an hour at the rate of 58c. per hour. The first 30 minutes of overtime is counted as one hour.

Brakemen in both passenger and freight service are on the same basis as conductors, except that the amount of pay is different Articles 1, 5, 7).

*Freight Service.*

In freight service, the pay is on a mileage basis, 4.1c. per mile for through freight and mixed, and 4.5c. per mile for local freight. 100 miles or less are paid as 100 miles. Overtime is paid in through freight service on a 12 miles per hour speed basis, and in local freight on a basis of 10 miles per hour. The rate is 49c. per hour for through freight and 45c. for local freight. Trainmen in local freight service are guaranteed 100 miles for each calendar working day. There is one excepted run in through freight service for which the pay is $6 per day, 12 hours or less to constitute a day. Overtime after 12 hours at the rate of 54c. an hour. In work, construction and wrecking service, the pay is $4.50 per day, 100 miles or less, 10 hours or less constituting a day. Overtime *pro rata* on a 10 mile an hour basis, at the rate of 45c. an hour. Circus trains are paid 133 miles for each move, with overtime when any move exceeds 12 hours. There are six branch line runs paid from $142.50 to $150 per month; 12 hours or less constitute a day's work,

with overtime after 12 hours at the rate of 44c. per hour. On the branch lines the day's work includes all extra service and yard work (Articles 2–5, 32).

### Engineers.

*Passenger.*

Engineers are paid 4.25c. to 4.40c. a mile according to engines, 100 miles or less to be paid as 100 miles. They are guaranteed $5.00 per day. Overtime is paid at the rate of 60c. per hour on a speed basis of 25 miles per hour (Articles 1, 24).

*Freight and Other Service.*

Freight service is paid rates per mile varying for different classes of service. In all cases 100 miles or less constitute a day's work. Overtime is paid at the rate of 60c. per hour on a 12 mile speed basis, for through freight, and 10 mile speed basis for local freight.

In work train service the pay is $5.00 per day with 10 hours or less to constitute a day. Overtime after 10 hours is paid at the rate of 50c. per hour.

On branch lines the rate is from $5.00 to $5.75 per day for 100 miles or less; over 100 miles, 5c. per mile. 12 hours or less constitute a day's work, with overtime after 12 hours *pro rata* (Articles 1–3).

### Firemen.

There is no agreement with the firemen.

## Norfolk and Western.

CONDUCTORS AND BRAKEMEN.

*Passenger.*

Conductors are paid 2.9c. per mile for runs of 155 miles or more, and $4.50 per day for runs of less than 155 miles. They are guaranteed $135.00 per month, in addition to overtime. Overtime is paid at the rate of 60c. per hour on the speed basis of 25 miles an hour. For computing overtime, arbitrary mileage is specified for the different runs (Articles A, B).

*Freight and Other Service.*

In through freight service, the pay is $4.10 per 100 miles, 100 miles or less to be paid as 100. In local freight the pay is $4.50 per 100 miles. The men are guaranteed 100 miles for each calendar working day. Overtime both classes is on the speed basis of 11 miles per hour at the rate of 45c. per hour.

Work or wreck train service is paid at the rate of $4.50 per day, 100 miles or less, 10 hours or less to constitute a day. Overtime at the rate of 45c. per hour. Circus trains are guaranteed 133 miles at through freight rates for each move, with overtime if any move consumes more than 12 hours.

There are 8 branch line runs having special rates. Six of these are on a basis of 10 hours or less to the day. One on a straight mileage basis, and one on a trip basis. On the last mentioned run overtime is paid after six hours and thirty minutes (Articles D–G).

BRAKEMEN.

Brakemen in both freight and passenger service are paid on the same basis as conductors, except that the rates of pay are different.

## Engineers.

### *Passenger.*

4.25 to 4.40c. per mile, according to size of cylinder of engine. Engineers are guaranteed $5.00 per day. Overtime is paid at the rate of 65c. per hour on a speed basis of 25 miles per hour (p. 1).

### *Freight and Other Service.*

Both through and local freight are paid according to mileage, the rates being 5.5c. for local and 5.25c. for through freight. Overtime is paid on the basis of 11 miles per hour at the rate of 60c. per hour. Engineers on Mallet engines are paid $6.50 per day of 11 hours or less, in all classes of service, with overtime at the rate of 65c. per hour.

Work on wreck-train service is paid per day of 10 hours or less, with overtime at 60c. per hour, and pusher service is paid the same amount per day of 11 hours or less. Such trains, making over 100 miles a day, are paid through-freight rates. There are many excepted runs and branch-line runs on different bases, some on a trip basis with overtime after one hour and one minute late each trip and some on an 11-hour day basis, and some on a 10-hour day basis.

There are a number of excepted runs on branch lines, paid at varying rates per trip, per mile or per day. In some instances, the day's work for these runs is 10 hours, in some 11, and in others the speed basis of 25 miles for passenger and 11 for freight applies (pp. 2–6).

## Firemen.

Firemen are paid in substantially the same way as engineers, but at lower rates.

## Seaboard Air Line.

### Conductors.

*Passenger.*

The pay is $4.50 per day for less than 155 miles and 2.9c. per mile for runs in excess of 155 miles. There is a monthly guarantee of $135.00. Overtime is computed on the 20-mile an hour speed basis and is paid at the rate of 58c. an hour (Articles 2, 6).

*Freight and Other Service.*

Mixed and freight service are paid at the rate of 4.1c. per mile, 100 miles or less to be paid as 100. Overtime is on the speed basis of 12½ miles an hour and is paid at the rate of 49c. an hour.

Local freight is paid at the rate of 4.5c. per mile, 100 miles or less to be paid as 100 miles. Overtime is computed on the 10 mile an hour speed basis and is paid at the rate of 45c. an hour.

In work, construction and wrecking service the pay is for a day; 100 miles or less, 10 hours or less to constitute a day. Overtime is paid *pro rata*. Crews in local freight and work train service are guaranteed 100 miles or 10 hours for each calendar working day.

There are a number of branch line runs taking daily rates. On these runs a day's work is understood to be 12 hours continuous service. Overtime is paid *pro rata* (Articles 3–6).

### Brakemen.

Brakemen are on the same basis as conductors, in both freight and passenger service, although the rates of pay are different.

## Engineers.

### *Passenger.*

Rates are 4.25c. to 4.40c. per mile. 118 miles or less constitute a day's work. Overtime at the rate of 65c. an hour is paid on the 20 mile speed basis (Article 1).

### *Freight and Other Service.*

Both through and local freight service are paid by the mile (the local at a higher rate) with 100 miles or less constituting a day's work. Overtime at the rate of 60c. per hour is paid on the 12½ mile speed basis for through freight and the 10 mile speed basis for local freight.

Work and wreck trains take daily rates, 10 hours or less to constitute a day's work. If over 100 miles are made, however, the through freight rate and basis apply. Overtime is paid at the rate of 50c. per hour.

There are several branch line runs for which a fixed daily rate is paid, with 12 hours or less constituting a day's work. On these runs, if passenger engineers make 118 miles or more, or freight engineers make 100 miles or more, payment is made on the mileage basis at main line rates (Articles 1–3).

## Firemen.

There is no agreement with the firemen.

## Delaware, Lackawanna & Western.

### Conductors.

*Passenger Service.*

$4.50 per day is paid for runs of less than 155 miles and 2.90c. per mile for runs of 155 miles or over with a minimum of $135 per month. Overtime is paid at the rate of 45c. per hour on the 20 mile speed basis but no overtime accrues until after 7 hours and 45 minutes. On short turn-around runs the "Eight Hour—Twelve Hour" Rule applies (Articles A–C).

*Freight and Other Service.*

Through freight, work, circus or wreck trains take a rate of 4c. per mile, 100 miles or less, 10 hours or less constituting a day's work. Wreck and work crews are guaranteed not less than 100 miles or 10 hours for each calendar working day. Way freight takes the rate of 4.5c. per mile, 100 miles or less, 10 hours or less to constitute a day's work. The same guarantee is given as in the case of work and wreck trains. Overtime is paid in all service other than passenger service on the speed basis of 10 miles per hour. There are two milk train runs on which an arbitrary of 100 miles is allowed for each leg of the round trip and overtime is paid after 5 hours in each direction. Brakemen are paid on substantially the same basis as conductors, though at different rates (Articles F–I).

### Engineers.

*Passenger Service.*

The minimum rate is $4.25 for 100 miles or less with higher rates for certain engines. Mileage in excess of 100 is

paid for *pro rata*. Overtime is paid at the rate of 50c. per hour and is on the speed basis of 20 miles per hour except in short turnaround runs where the "Eight Hour-Twelve Hour" rule applies (pp. 3, 5).

*Freight and Other Service.*

The rates in through freight service are $4.75 to $4.95 per day for 10 hours or less, 100 miles or less. Mileage in excess of 100 is paid for *pro rata*. Through freight rates apply to work, wreck, pusher, mine, circus and milk trains. Local freight rates are 25c. per 100 miles or less higher than through freight rates. Overtime in all freight service is paid for *pro rata* on the speed basis of 10 miles an hour (pp. 3, 7).

FIREMEN.

*Passenger Service.*

The rate per day is from $2.45 to $4.00 according to the engine. 100 miles or less, 5 hours or less constitutes a day's work. Overtime is paid at the rate of 30c. per hour on the speed basis of 20 miles per hour except in short turnaround runs where the "Eight Hour-Twelve Hour" rule applies (Articles B and C).

*Freight and Other Service.*

Firemen in freight and other service are paid on the same basis as engineers, though at different rates.

**Alabama & Vicksburg, New Orleans & Northeastern and Vicksburg, Shreveport and Pacific.**
(The schedules for these three roads are practically identical.)

CONDUCTORS.

*Passenger Service.*

On runs of 155 miles or over per day 2.9c. per mile is paid; on runs of less than 155 miles per day $4.50 per day. There is a guarantee of $135 per month, to be paid exclusive of overtime and extra trips, except trips made from regular layover of man making trip. Overtime is computed on basis of 20 miles per hour at 58c. per hour. On the N. O. & N. E. there are two excepted runs paying $3.25 per trip and $3.85 per trip. (No mention of basis.)

*Freight and Other Service.*

Through freight and mixed service is at rate of 4.10c. per mile, 100 miles or less to be paid as 100 miles. For handling slag or ballast through freight rates are paid and overtime for all time consumed, minimum of $4.10. Overtime is on basis of 12½ miles per hour at 51 cents per hour. On the N. O. & N. E. there is an excepted run as follows: New Orleans-Picayune: One trip per day $4.10; two or more trips, $2.90 for each trip. Overtime allowed after schedule has been exceeded. In local freight service a rate of 4.50c. per mile is paid, 100 miles or less to be paid as 100 miles. Regularly assigned crews are guaranteed 100 miles for each calendar working day, including Legal Holidays, except when line is broken through Act of Providence. Overtime is on basis of 10 miles per hour, at 45c. per hour. In work and wrecking service the rate is $4.50 per day, 100 miles or less, 10 hours or less constituting a day; overtime *pro rata.*

There is a guarantee of not less than 100 miles or 10 hours for each calendar working day held for such service. In computing overtime, first 30 minutes counted as one hour; each additional 60 minutes, another hour in all services. Circus trains are guaranteed 133 miles at through freight rates for each move, this to include switching, loading and unloading. When any move consumes more than 12 hours, overtime will be paid. Without stopping to exhibit, paid through freight rates.

### Brakemen.

Brakemen are on the same basis as Conductors, except rates and overtime pay is lower.

### Engineers.

#### *Passenger Service.*

$4.25 and $4.40 per 100 miles or less is paid; minimum, $5 for each calendar day. Overtime is on speed basis of 20 miles per hour, at 70c. per hour. There are exceptions on the N. O. & N. E. as follows: 1 run paying 4.50 per trip; 1 run paying $5 per round trip, with overtime if earned; 1 paying actual mileage; 1 paying 100 miles in each direction (turn around run), with overtime based on miles paid for and computed in each direction separately.

#### *Freight and Other Service.*

Through freight and mixed service is at rate of $5.15 and $5.40 per 100 miles or less. Overtime is on speed basis of 12½ miles per hour at 60 cents per hour. There are exceptions on the N. O. & N. E. as follows: 1 run paying $5.15 when one trip is made; when two trips are made, $3.05 each way. Overtime when more than one trip is made will begin when schedule has been exceeded one hour. For one hour, one

hour will be paid; 1 hour and 30 minutes, 2 hours, etc. Local freight service is at rate of $5.75 per 100 miles or less, 10 hours or less. There is an exception on the N. O. & N. E. of 1 run paying $5.50 per day. Overtime is on basis of 10 miles per hour at 60c. per hour. Work trains are paid $5 per day, 10 hours or less to constitute a day. Over 100 miles classed as through freight. Through freight rates are paid for circus trains; for wreck trains, 50 cents per hour is paid in lieu of mileage for all time consumed from reporting to return to terminal, minimum of ten hours. In computing overtime, in all road service, except as otherwise specified, 30 minutes or less is not counted; over 30 minutes, one hour; 1 hour 30 minutes, 2 hours.

### Firemen.

While these roads claim to have no agreement with their Firemen, they have a memorandum showing rates, rules and regulations which is substantially the same as Engineers, except the rates are lower.

## Atlanta, Birmingham & Atlantic.

### Conductors.

*Passenger Service.*

On runs of less than 155 miles per day $4.50 is paid; runs of 155 miles and over per day, $2.90 per mile. There is a guarantee of $135 per month. Overtime is allowed at *pro rata* rates computed on speed basis of 20 miles per hour, first thirty-one minutes counting as one hour. Several excepted passenger runs are paid actual mileage, with guaranteed minimum per day, usual rate of overtime. As to 1 run, 3 round trips or less, 10 hours actual service, or held for duty, or less, in 14 hour period constitutes a day (Articles 1, 2).

*Freight and Other Service.*

In through and mixed freight a rate of 4.10c. per mile is paid, 100 miles or less to be paid as 100 miles. As to through freights on turnaround basis, if the trip is completed within 12 hours, layover time is deducted. Overtime is allowed after 12 hours. If not completed within 16 hours, not less than 100 miles is allowed for each part of trip. On the Ashland Branch, 3 round trips or less, not over 10 hours actual service, or 14 hour period from time reporting, constitute a day. All actual service over 10 hours, or all over 14 hour period is paid overtime. Overtime is at *pro rata* rates, computed on speed basis of 12½ miles per hour. In local and log trains the rate is $4.50c. per mile, 100 miles or less to be paid as 100 miles. Overtime is at *pro rata* rates, on basis of 10 miles per hour.

In work trains the rate is $4.50 per day, the following to constitute a day:

May, June, July and August; 6 A. M. to 6 P. M., 1 hour for dinner; September and October, 6 A. M. to 5 P. M., one

hour for dinner; November, December, January and February, 7 A. M. to 4.30 P. M., 30 minutes for dinner; March and April, 6 A. M. to 5 P. M., 1 hour for dinner. There is a guarantee of not less than 100 miles for each calendar day held for such service. Overtime is at *pro rata* rates on speed basis of 10 miles per hour.

In computing overtime, first 31 minutes is counted as one hour; thereafter, 60 minutes for each additional hour. This applies to all service, except where otherwise specified (Articles 3–5).

### Brakemen.

Brakemen are on same basis as conductors except as to rates.

### Engineers.

#### *Passenger Service.*

4.25c. per mile is paid for 100 miles or less; over 100 miles *pro rata*. There are several runs paid actual mileage. 1 run, first 3 round trips, if completed within 14 hours, $5.00 per day, provided time on duty does not exceed 10 hours. Additional trips are at $1.80 per round trip. Overtime is at 60 cents per hour for all delayed time on basis of 20 miles per hour (Articles 1, 2).

#### *Freight and Other Service.*

In through freight and mixed service a rate of $5.15 and $5.40 per 100 miles or less is paid; over 100 miles, *pro rata*. Turnaround trains are paid straight mileage for all time on duty over 12 hours, time relieved at turning point to be deducted, usual rate of overtime. If trip is not completed within 16 hours, 100 miles each way is allowed. Overtime at 60 cents an hour is paid on basis of 12½ miles per hour. In local service a rate of $5.50 per 100 miles or less is paid; over 100

miles *pro rata*. Turnarounds are paid on actual mileage basis; if round trip is not completed within 12 hours, 100 miles each way is allowed. Overtime is paid at 57c. per hour on basis of 10 miles per hour. In work trains and pile driving the rate is $4.75 per day, 100 miles or less. Over 100 miles is classed as through freight. The following constitutes a day's work: May, June, July and August, 6 A. M. to 6 P. M., 1 hour for dinner; September and October, 6 A. M. to 5 P. M., one hour for dinner; November, December, January and February, 7 A. M. to 4:30 P. M., 30 minutes for dinner; March and April, 6 A. M. to 5 P. M., 1 hour for dinner. Overtime is at 50 cents per hour. Circus or wrecking trains take through freight rates, 100 miles or less to constitute a day. Over 100 miles *pro rata*. In all road service, overtime over 30 minutes will be allowed one hour; 1 hour and 30 minutes, 2 hours, etc. (Articles 1, 2).

### Firemen.

There is no agreement with the firemen.

## Charleston & Western Carolina.

### Conductors.

*Passenger.*

On runs of 155 miles or over per day the rate is 2.9c. per mile. On runs less than 155 miles per day; $4.50 per day. There is a guarantee of $135.00 per month. Overtime is paid on the speed basis of 20 miles per hour at the rate of 45c. per hour (Articles 1, 4).

*Freight and Other Service.*

On mixed and through freight service the rate is 4.10c. per mile, 100 miles or less to be paid as 100 miles. In local freight service the rate is 4.50c. per mile, 100 miles or less to be paid as 100 miles. There is a guarantee of 100 miles for each calendar working day. In work trains and working service $4.50 per day is paid 100 miles or less, 10 hours or less, to constitute a day. Overtime in through freight is on the basis of 12 miles per hour; local freight, 10 miles per hour and is at the rate of 45c. per hour; first 30 minutes to be counted as one hour.

The rates on two branches are as follows: Through or mixed trains, $4.24 per day. Local freight $3.94 per day. 12 hours or less to constitute a day; overtime 45c. paid. On short runs $4.00 per day is paid; 12 hours or less to constitute a day, 45c. per hour for overtime (Articles 2-7).

### Brakemen.

Brakemen are paid on the same basis as conductors, except there is a guarantee of 100 miles in work train service for brakemen.

## Engineers.

### *Passenger.*

The rate is 4.25c. per mile with a minimum of $5 per day. Overtime is on the speed basis of 20 miles per hour at the rate of 60c. per hour (Articles 1, 10).

### *Freight and Other Service.*

In through Freight service the rate is 5.15 and 5.40c. per mile, according to engines. 100 miles or less to be paid as 100. Overtime on basis of 12½ miles per hour at 60c. per hour. In local freight service the rate is 5.75c. per mile, 100 miles or less to be paid as 100. Overtime on basis of 10 miles per hour at 60c. per hour. In work train service $5 is paid for each work day; time in excess of 10 hours will be paid for at 50 cents per hour. Circus and wreck trains are paid through freight rates. In computing overtime less than 30 minutes is not counted; 50 minutes is paid as one hour; one hour and 30 minutes as two hours, etc. (Articles 1, 4, 5, 10).

## Firemen.

There is no agreement with the firemen.

## Georgia & Florida Railway.

CONDUCTORS.

*Passenger Service.*

On runs of 155 miles or over, 2.75c. per mile is paid; runs of less than 155 miles per day, $4.25 per day. There is a guarantee of $127.50 per month, to be paid in addition to overtime or extra trips, except trips made from regular layover point. Overtime is on the basis of 20 miles per hour, at the rate of 54 cents per hour, 30 minutes counting as one hour (Article 1).

*Freight and Other Service.*

In through freight and mixed freight the rate is 3.55 per mile, 100 miles or less constituting a day; over 100 miles *pro rata*. Overtime is on the basis of 12½ miles per hour, at 44 cents per hour, 30 minutes counting as one hour. In local service a rate of 4.20c. per mile is paid, 100 miles or less, 10 hours or less constituting a day; over 100 miles *pro rata*. Overtime is paid at 42 cents per hour, on a basis of 10 miles per hour, 30 minutes counting as one hour. There is a guarantee of 100 miles for each calendar working day. There is one excepted run paid on basis of 12 hours per day. In work, wreck and construction service a rate of $3.55 per day is paid, 100 miles or less, 10 hours or less constituting a day; over 100 *pro rata*. Overtime is on basis of 10 miles per hour at 35c. per hour, 30 minutes counting as one hour. There is a guarantee of 100 miles for each calendar day held for such service. There are 4 branch runs paying specified amounts per mile, with overtime after 12 hours. One run paying $97.50 per month gives overtime after 30 minutes late on last trip. A day's work includes extra service on branch lines (Articles 2–9, 17).

### Trainmen.

Trainmen are on same basis with lower rates.

### Engineers.

Engineers and Firemen are on substantially the same basis as conductors, except in passenger service a minimum of $4.00 per day is allowed for engineers and $2.00 for firemen, 100 miles or less constituting a day. Overtime is on same basis as conductors (Article 1).

## Georgia Railroad.

### Conductors.

*Passengers.*

Runs of 155 miles or over per day are paid at the rate of 2.90c. per mile ; runs of less than 155 miles per day, $4.50 per day. There is a guarantee of $1.35 per month, exclusive of overtime and extra trips, except trips made from regular lay-over point. Overtime is on basis of train schedule, presumably, although no reference is made. Rate, 45c. per hour (Articles A, B and C).

*Freight and Other Service.*

In through-freight service the rate $4.10c. per mile ; 100 miles or less to be paid as 100 miles. Overtime is on speed basis of 12 miles per hour, at the rate of 45c. per hour. In local freight service, 4.50c. per mile is paid ; 100 miles or less to be paid as 100 miles. Crews are guaranteed 100 miles per day for each calendar working day. Overtime is on basis of 10 miles per hour at 45c. per hour.

In work, wreck and construction service, the rate is $4.50 per day, with overtime after 12 hours on duty at 45c. per hour (Articles D, E, G).

### Brakemen.

Brakemen are on the same basis as conductors, except as to rates.

### Engineers.

*Passenger.*

4.25c. per mile, with minimum of $5.00 per day is paid ; when mileage exceeds that amount, straight mileage is paid. Overtime is on basis of 20 miles per hour at the rate of 60c. per hour. 30 minutes to be regarded as one hour (Articles 1, 8).

*Freight and Other Service.*

In through freight and mixed service the rate is 5.15 to 5.65c. per mile. Overtime is on basis of 12½ miles per hour at 60c. an hour ; 30 minutes to be counted one hour. In local freight service the rate of 5.75c. per mile. Overtime is on basis of 10 miles per hour, at the rate of 60c. per hour ; 30 minutes to be counted one hour.

There are three crews on the run between Augusta and Buckhead who are paid $152.50 per month, overtime being paid only after 12 hours.

For work train service the rates are $5.00 and $5.40 per day : ten hours or less to constitute a day. Over 100 miles is classed as through freight (Articles 1, 2, 8).

FIREMEN.

Firemen are on the same basis as engineers, with lower rates.

## Georgia Southern & Florida.

### Conductors.

*Passenger.*

For runs of 155 miles or over per day the rate of 2.9c. per mile. For runs of less than 155 miles per day, $4.50 per day. There is a guarantee of $135.00 per month, to be paid exclusive of overtime and extra trips, except such trips as are made from regular layover point of man making such trip. Overtime at 58 cents per hour is paid for delay on speed basis of 20 miles per hour; 30 minutes in excess counts as 1 hour (Articles 1, 13).

*Freight and Other Service.*

In through freight and mixed service the rate is 4.10c. per mile, 100 miles or less, to constitute a day. Overtime is paid at 51c. per hour, on speed basis of 12½ miles per hour; 30 minutes in excess counted as one hour. In local freight service 4.50c. per mile is paid, 100 miles or less to constitute a day; excess mileage, *pro rata*. Ten hours or less constitutes a day; over ten hours is paid at *pro rata* rates. Overtime is paid at 45.5c. per hour on basis of 10 miles per hour; 30 minutes in excess counted as one hour. There is a guarantee of 100 miles per day for each calendar working day except when line is broken through Act of Providence. This includes Legal Holidays. In work wreck and construction and wood train service the rate is 4.5c. per mile, 100 miles or less, 10 hours or less, to constitute a day's work. Excess mileage over 100 is paid at mileage rates; overtime on basis of 10 miles per hour. Overtime rate is at rate of 45c. per hour. Work trains are guaranteed not less than 100 miles or ten hours for each calendar working day held for such ser-

vice. Circus trains are guaranteed 133 miles at through freight rates for each move, this to include switching, loading and unloading. When any move consumes more than 12 hours, overtime allowed for allowed for all time in excess of 12. When not stopping to exhibit, through freight rates apply (Articles 2-4, 13).

### Brakemen.

Same basis as conductors; rates and overtime pay, lower.

### Engineers.

#### *Passenger.*

The rates are 4.25 and 4.40c. per mile; 100 miles or less. Over 100 miles is paid *pro rata*. There is a minimum of $5.00 per day. Overtime is on speed basis of 20 miles an hour at *pro rata* rates (Articles 1, 10).

#### *Freight and Other Service.*

In through freight service the rate is 5.15c. and 5.40c. per mile; 100 miles or less. Over 100 miles is paid *pro rata*. In local freight service the rate is 5.75c. per mile, 100 miles or less, 10 hours or less, to constitute a day; over 100 miles *pro rata*. Crews are guaranteed 100 miles for each calendar day, except Sundays. In work train service $5.00 per day is paid for 100 miles or less, exclusive of meal hour, to constitute a day. Over 100 miles is paid on through freight rates. Circus and wreck train crews are paid through freight rates, 100 miles or less to constitute a day, miles in excess of 100 *pro rata*. Overtime is paid on basis of 12½ miles per hour for through freight, 10 miles per hour for local freight and work trains (Articles 2-5, 10).

### Firemen.

Firemen are on substantially the same basis as engineers, with little lower rates.

## Gulf and Ship Island Railroad.

### Conductors.

*Passenger.*

On runs of 155 miles or over, per day, the rate is 2.6c. per mile. On two runs making but 160 miles per day, conductors paid $140.00 per month. On runs of 155 miles or less, $4.50 per day. Overtime is paid on the basis of 20 miles per hour, and on turnarounds it is computed separately for each leg; 30 minutes not counted; over 30 minutes, 1 hour. Rate 60c. per hour (Articles 1, 2, 4, 5).

*Freight and Other Service.*

In mixed and through freight service the rate is 3.7c. per mile, 100 miles or less to constitute a day. Overtime is computed on speed basis of 12½ miles per hour, at *pro rata* rate. Over 30 minutes counted as one hour. In local, work, construction and wrecking service the rate is $4.10 per day; 100 miles or less, 10 hours or less, to constitute a day's work. Excess mileage and overtime *pro rata*. Overtime computed on 10 miles per hour basis; over 30 minutes to count as one hour (Articles 5, 6).

### Brakemen.

Brakemen's pay is on the same basis but at lower rate.

### Engineers.

*Passenger.*

The rates are $4 per 100 miles, 100 miles or less to constitute a day. Overtime on basis of 20 miles per hour. Minimum of $4.50 per day is paid for all regular runs (Article 1).

*Freight and Other Service.*

In mixed and through freight service the rate is 5c. per mile, 100 miles or less to constitute a day. Overtime on speed basis of 12½ miles per hour, at 50c. per hour, 30 minutes to count as one hour. In local freight service the rate is $5.25 per day 10 hours or less, 100 miles or less to constitute a day; 50c. per hour is paid for overtime, 30 minutes to count as one hour.

In work service the rate is $4.50 per day, 12 hours or less to constitute a day. Over 100 miles is classed as through freight (Articles 2–4).

FIREMEN.

There is no agreement with the firemen.

## New Orleans Great Northern.

### Conductors.

*Passenger Service.*

Runs of 155 miles or over per day are paid 2.9c. per mile. There is a guarantee of $135.00 per month, the minimum daily rate is $4.50, applying to all runs of less than 155 miles per day. This guarantee is exclusive of overtime and extra trips, except trips made from regular layover point. On pay trains, $4.50 per day of less than 155 miles is paid; for a trip over 155 miles regular passenger rates are paid; overtime is paid after 10 hours service. Overtime in passenger service begins 60 minutes after scheduled arriving time; for additional hours, 30 minutes or less are not counted.

*Freight and Other Service.*

On through freight service $4.10 is paid per 100 miles, 4.1c. is paid per mile; 100 miles or less constitutes a day. Overtime is allowed on the basis of 10 miles per hour. In local freight a rate of $4.50 per day is paid, 100 miles or less, 10 hours or less constituting a day. For over 100 miles the rate is 4.5c. per mile. There is a guarantee of 100 miles for each calendar working day. In mixed service the rate of $4.25 per day is paid and 100 miles or less, 10 hours or less constitutes a day. There is a guarantee of 100 miles for each calendar working day. In work, wreck and construction service a rate of $4.50 per day is paid, 10 hours or less than 100 miles constituting a day. The rate for over 100 miles is 4.5c. per mile. There is a guarantee of $4.50 per day for each calendar working day held for such service. Overtime for all classes is paid at 47 cents per hour. In com-

puting overtime, less than 30 minutes is not counted, and any time over 30 minutes is counted 1 hour, excepting passenger trains.

### Brakemen.

There appears to be no agreement, but memorandum shows that Passenger Flagmen are paid $2.50 per day and after 10 hours 25c. overtime is paid. Through Freight Brakemen are paid $2.35c. per mile on basis of 10 miles per hour, and Local Flagmen making runs of over 100 miles per day are paid 2.40c. per mile. Overtime is based on speed of 10 miles per hour.

### Engineers.

#### *Passenger Service.*

The rate is $4.15 per 100 miles or less; over 100 miles, *pro rata*. There is a guarantee of $5.00 per calendar day. Overtime is on the speed basis of 20 miles per hour; 30 minutes to be counted one hour; rate is 65c. per hour.

#### *Freight and Other Service.*

In through freight service the rate is $5.15 per 100 miles or less. Overtime is on speed basis of 12½ miles per hour, at rate of 60c. per hour; 30 minutes is counted as one hour. For work trains and pile drivers $4.75 per day is paid, 100 miles or less, 10 hours or less constituting a day. For over 100 miles through freight rates obtain. Overtime is paid after 10 hours at 50c. per hour and 30 minutes is counted 1 hour. In local freight service the rate is $5.40 per 100 miles or less; mileage in excess of 100, *pro rata*. Overtime is paid after 10 hours at 60c. per hour; 30 minutes are counted as one hour. Circus or wreck service is paid through freight rates, 100 miles or less constituting a day.

### Firemen.

Firemen are on same basis as engineers, with lower rates.

## Norfolk Southern Railroad.

### Conductors.

*Passenger.*

Runs of 155 miles or over per day, 3c. per mile North of Raleigh. 2.90c. per mile south of Raleigh. Runs of less than 155 miles per day, $4.30, south of Raleigh. There is a guarantee of $112.00 per month. Overtime is paid on speed basis of 20 miles per hour, at 60c. and 58c. respectively for north and south of Raleigh (Articles 1, 6).

*Freight and Other Service.*

In mixed and through freight service the rate is 4.10c. per mile, 100 miles or less. Overtime on basis of 12 miles per hour; at rate of 47c. per hour. In local freight service the rate is 4.40c. per mile, 100 miles or less; overtime on basis of 10 miles per hour, at 44c. per hour.

In wreck, log work and construction service the rate is $4.30 per day, 12 hours or less to constitute a day's work, 36c. per hour overtime. In computing overtime for all services first 30 minutes counts nothing; over 30 minutes, one hour.

There are 9 branches taking rates from $4.15 to $4.25, 6 on 10 hour day; 1 on 11 hour day; and 2 on 12 hour day. On several of these runs, no overtime is to be paid. On two branches, monthly rates of $125.00 and $100.00 are paid and there is no overtime (Articles 2–6).

### Brakemen.

Brakemen are on the same basis as conductors, including branches, which are at specified day rates, 10, 11 or 12 hours constituting a day in different cases.

## Engineers.

### *Passenger.*

The rates are 4.00 and 4.25c. per mile north and south of Raleigh, respectively; 100 miles or less. Overtime on basis of 20 miles per hour at 65c. per hour, and 58c. per hour, respectively, first 30 minutes not counted (Articles 1, 5).

### *Freight and Other Service.*

On freight and other service the basis of pay is the same as for conductors, except that rates are higher.

On branch lines, $4.50 and $4.75 is paid per day, 12 hours or less to constitute a day's work; 40 and 45c. per hour overtime. This includes all work and switching necessary. First 30 minutes of overtime not counted. On Carthage Branch, pay is $100 per month, with no overtime (Articles 2, 3, 6).

## Firemen.

There is no agreement with the firemen.

## Richmond, Fredericksburg & Potomac.

CONDUCTORS.

*Passenger.*

Runs of 155 miles or over per day are paid at the rate of 2.9c. per mile ; runs of less than 155 miles per day are paid at the rate of $4.50 per day. There is a guarantee of $135.00 per month, to be paid exclusive of overtime and extra trips, except trips made from regular layover point. Overtime is allowed when time served is in excess of 90 minutes more than schedule of train ; overtime thereafter for each hour or fractional part thereof, is paid at the rate of 53c. per hour (Rules 1, 2).

*Freight and Other Service.*

In through freight service, the rate is 4.10c. per mile, 8 hours or less (108 miles) between Boulton and Potomac Yards ; nine hours or less (124 miles) between Clopton and Pot. Yard, to constitute a day's work. 100 miles or less is paid as 100. On turnaround runs, 100 miles or 8 hours allowed for each run at 4.10c. per mile ; overtime after 8 hours, at tha rate of 55c. per mile ; over 100 miles, or 8 hours, *pro rata.*

In local freight service, the rate is 4.5c. per mile, 9 hours or less, and 10 hours or less covering two specific runs. Overtime is paid *pro rata.* There is a guarantee of 100 miles for each calendar working day.

In work, ballast, wrecking and construction service, $4.50 per day is paid, 100 miles, 10 hours or less, exclusive of meal hour, to constitute a day. Overtime is paid *pro rata.* There is a guarantee of 100 miles or 10 hours for each day held for such service. In computing overtime, the first 30 minutes are counted as one hour ; overtime rates are 45, 50 and 55c. per hour (Rules 4–6).

### Brakemen.

Brakemen are on the same basis as conductors, but at lower rates.

### Engineers.

*Passenger.*

Four local passenger runs and three through passenger runs are enumerated, taking specified rates for trip or round trip. For trips not provided for, six hours or less, 116 miles or less, $5.40 will be the minimum paid; for trips over 116 miles, the rate will be at 4.25c. per mile. If over six hours, overtime at the rate of 70c. per hour will be paid (p. 3, Rule 50).

*Freight and other Services.*

In through freight service, two through freight trips are listed, on the basis of $5.60 and $6.45 per trip, with overtime after 8 and 9 hours. On other freight runs, 100 miles, 8 hours or less, constitute a day's work, at $5.20; overtime is allowed after 8 hours.

In local freight service, there are two local trips listed, on the basis of $5.25 and $5.80 per trip; with overtime after 9 and 10 hours. On other runs, 100 miles, 8 hours or less, constitute a day, at $5.50 per day. Overtime after 8 hours is allowed at the rate of 70c. per hour.

In work and ballast service, the rate of pay is $5.00 per day, 10 hours or less; overtime is at the rate of 50c. per hour after 10 hours; in computing overtime, less than 30 minutes is not counted, 30 minutes and over are counted as one hour (pp. 3–5, Rule 50).

### Firemen.

Firemen are on the same basis as engineers, but at lower rates.

## St. Louis, Brownsville and Mexico.

### Conductors.

*Passenger.*

Conductors are paid $143 per month for less than 4,000 miles; $154 for 4,000 to 4,800 miles; $165 for 4,800 to 5,500 miles; excess mileage is paid at the rate of 3.3c. per mile. Overtime is on the basis of 20 miles an hour, at 38.5c. per hour (Article 1).

*Freight and Other Service.*

Through freight is paid at the rate of 4.18c. per mile, 100 miles or less, 8 hours or less, to constitute a day. Overtime is on the speed basis of 12½ miles an hour, at the rate of 41.8c. per hour. Local freight and mixed service is paid $139.15 per month, 26 or 27 days to constitute a month, 10 hours or less to constitute a day. Overtime is paid after 10 hours at 53.9c. per hour.

Work and wreck train crews are paid by the month, 26 or 27 days to constitute a month, 10 hours or less to constitute a day. Overtime is paid after 10 hours, at 41.8c. per hour (Articles 2-4).

### Brakemen.

There is no agreement with the brakemen.

### Engineers.

*Passenger.*

The rates are 4.30c. to 4.40 per mile, 100 miles or less to constitute a day. A minimum of $4.40 is allowed on all short runs where the mileage does not produce that amount. Overtime is on the speed basis of 20 miles an hour, at 44c. per hour (Rule 4).

*Freight and Other Service.*

In through freight service, the rates are 4.90c. and 5.40c. per mile, 100 miles or less, 8 hours or less, to constitute a day. Overtime is on the speed basis of 12½ miles per hour and $\frac{1}{10}$ of the daily rate is paid per hour. In local freight service, the rate is 5.50c. per mile and higher, 100 miles or less, 10 hours or less, to constitute a day. Overtime is on the basis of 10 miles an hour, and $\frac{1}{10}$ of the daily rate is paid for each hour.

Work, wreck, pusher and helper service is paid $4.75 to $6.50 per day, 100 miles or less, 10 hours or less to constitute a day. Overtime is paid *pro rata* (Rules 5–7).

FIREMEN.

Firemen are on the same basis as engineers, except in through freight service overtime is on the same basis of 10 miles an hour, instead of 12½ miles, as for engineers.

## STATEMENT OF ADDITIONAL COMPENSATORY PROVISIONS.

In addition to the pay which the men receive for their ordinary work, provision is made for compensating them for various additional services and for cases where through no fault of their own they are prevented from performing all or part of the work on which their regular compensation is based. Some of the more important of these provisions which are in general use are illustrated below.

### Held Away from Home Terminal.

To protect the employee who is held at other than his home terminal without being given an opportunity to perform service, a majority of the Engineers' Schedules in the Eastern Territory contain, with some modifications, the following rule:

> Engineers in unassigned freight service held 28 hours at other than their designated home terminal without performing service will be paid overtime rates as follows: 10 hours for the first 28 hours so held and 10 hours additional overtime for each complete 24 hours so held thereafter, provided that this regulation does not apply to engineers delayed by reason of compliance with the law or obstructions of the line through act of Providence. The above regulation effective November 1, 1912. (*Article 39 Pennsylvania Schedule.*)

In other cases the rule is similar in intent to the following:

> Freight engineers receiving a day's pay in one direction if held at other than home terminal will be paid at through freight rates after ten hours. This will not apply to men whose runs are scheduled for a lay over of more than 12 hours. *Article 21, Rule 1, Boston & Maine Schedule.*

In the Western Territory a similar provision is as follows:

> Engineers in pool freight and in unassigned service held at other than home terminal, will be paid continuous time for all time so held after the expiration of twenty-two hours from time relieved from previous duty, at the rate per hour paid him for the last service performed. If held fourteen hours after the expiration of the first thirty-two hour period, he will be paid continuous time for the next succeeding ten hours, or until the end of the twenty-four hour period, and similarly for each twenty-four hour period thereafter. Should an engineer be called for duty after pay begins, his time will be computed continuously. *Rule 50, Chicago, Burlington & Quincy Railroad Schedule.*

In the South Eastern Territory, the rule is similar to that in the Eastern Territory.

For the firemen, the provisions in the Eastern Territory is substantially as follows:

> Firemen in pool freight and in unassigned service held at other than home terminal, will be paid continuous time for all time so held after the expiration of eighteen (18) hours from time relieved from previous duty, at the rate per hour paid him for the last service performed. If held fourteen (14) hours after the expiration of the first twenty-eight (28) hour period, he will be paid continuous time for the next succeeding ten (10) hours, or until the end of the twenty-four (24) hour period and similarly for each twenty-four (24) hour period thereafter. Should a fireman be called for duty after pay begins, his time will be computed continuously. *Erie Railroad, Schedule, Article 11.*

In the Western Territory, the provision is the same for firemen as for engineers and in the Southeastern territory, the same rule generally is applied to firemen that is applied to engineers.

For conductors and trainmen in the Eastern Territory

(with the addition of a clause relative to the designation of home terminals) the provision is the same as that for firemen and is generally applied subject to modifications such as the following:

> Freight men receiving a day's pay in one direction, if held at other than home terminal, will be paid at freight rates after ten (10) hours. This will not apply to men on regular runs making trips over the road each day whose runs are scheduled for a lay-over of more than ten (10) hours, but such men's time will begin not later than thirty minutes before regular fixed leaving time *(Rule 55, Boston and Maine Railroad Schedule).*

Or that contained in the memorandum agreement on the Delaware, Lackawanna and Western Railroad:

> No. 9—Page 43.
>
> CREWS HELD AWAY FROM HOME TERMINALS.—It is agreed that the eighteen-hour period, stipulated in the agreements, means from the time of arrival of crew at terminal, until departure as shown by the train register.

In the Southeastern territory, the same rule generally is applied to Conductors and Trainmen as to engineers.

### TERMINAL DELAY.

It is not the practice in the Eastern Territory to make special payments for delay at the Initial Terminal, but it is quite general on the Western and Southeastern Territories to pay for such delay under rules similar to the following:

> When delayed within the terminal as much as one hour beyond the time set to leave, engineers will be paid one hour overtime; one hour and thirty minutes to constitute two hours, etc. If road overtime is made on same trip initial overtime will be deducted (*Atlantic Coast Line*, Engineers' Schedule, Art. 16).

There is much variation in the application of such rules in the Western Territory. Some pay actual time; with some the terminal delay accrues after 5 minutes, 15 minutes or 30 minutes. With some it is paid in addition to overtime accruing on the trip, with others, it is paid only when the miles of the trip exceed the hours.

For delay at final terminal the following rule is generally applied to both Engineers and Firemen in the Eastern Territory:

> For freight service final terminal delay shall be computed from the time the engine reaches designated main track switch connection with yard track. For passenger service final terminal delay shall be computed from time train reaches terminal station. Final terminal delay, after the lapse of one hour, will be paid for at the end of the trip at overtime rate, according to class of engine, on the minute basis. If road overtime has commenced, terminal overtime shall not apply, and road overtime will be paid to point of final relief.—*Engineers Schedule, Art. 21, Pittsburgh & Lake Erie Railroad.*

On certain of the Eastern roads former rules have been retained such as the following:

> Engineers in Freight or Passenger Service detained forty-five minutes after arrival at end of run will be paid for one hour in excess of mileage; if detained longer than one hour, one mile will be allowed for each six minutes thereafter. This does not apply to engineers paid under overtime rule.—*Delaware, Lackawanna & Western Railroad, Engineers, Art. 13.*

In the West, the engineers and firemen are generally covered by the following rule:

> Initial terminal delay: Engineers delayed one hour or more in starting from a terminal will be paid hourly rates for the full delay.
>
> Final Terminal Delay, after the lapse of 30 minutes,

will be paid for the full delay at the end of the trip, at the overtime rate, according to class of engine, on the minute basis.

Final terminal delay shall be computed from the time the engine reaches designated main track switch connection with the yard track.

If road overtime has commenced, terminal overtime shall not apply, and road overtime will be paid to point of final relief. *Chicago, Burlington & Quincy Railroad Schedule* (*Rule* 8).

This rule applies on such Western roads where the engineers and firemen have accepted it as better than the previous rule.

Under the Eastern rules, the one hour lapsed time is not paid for as terminal delay while under the Western rules the whole time is paid for where Final terminal delay accrues.

In the Southeastern Territory, the following rule is generally applied to both Engineers and Firemen:

Final terminal delay will be paid for at the end of the trip when delayed between the yard limit boards governing the yard in which the train is to be delivered, and the point of final relief, more than 30 minutes beyond the time required by the Road Miles per Hour speed for such trains; over 30 minutes to be paid one hour; one hour and 30 minutes, two hours, etc. *Art. 17, Louisville & Nashville R. R. Engineers Schedule.*

For Conductors and Trainmen delay at final terminal is not generally paid for separately by the roads in the Eastern Territory, although a number of roads have such rules (see Delaware, Lackawanna and Western No. 13, page 44, Conductors and Trainmens Schedule), but it is quite commonly paid in the Western and Southwestern Territories under rules similar to those above quoted.

### Called and Not Used.

If an employee be called for service and for any reason other than his own acts is not used, he is paid under rules similar to the following:

> Passenger and freight road trainmen called to report for duty and through no fault of their own not used as called, will be paid for the time held for duty, with a minimum of three (3) hours, and not lose their turn. If used, not less than a minimum day will be allowed, and stand last out (*Pennsylvania Railroad Conductors and Trainmen, Schedule, Art. 4*).

The schedules of nearly all the railroads contain rules similar to the foregoing, the compensation varying from the quarter of a day (stated variously as one-quarter day, 25 miles or 2½ hours) to not less than a minimum day, and may be stated in hours, in miles, or in fractions of a day.

### Switching at Terminals and Intermediate Points.

Where road crews (usually however confined to through freight crews) are required to perform switching at terminals or intermediate points, they usually are compensated for such work under rules similar to the following:

> At points where switching engines are employed, freight crews will not be required to switch cars or make up trains while switching engines are on duty.
>
> If it becomes necessary for road crews to do switching in yards, while switching engines are on duty, they will be paid for such work as extra service, at the hourly rate, sixty (60) minutes or less to count one (1) hour, and this time to be accumulative. Taking cars or leaving cars from more than two (2) tracks, or cars that do not stand ahead on tracks, to be considering switching. *Rule 30, New York, New Haven & Hartford R. R. Schedule.*

Such rules, however, are much varied in application, as to whether switch engines are employed at the station where the switching is done or are on duty, whether or not the cars handled are for movement in the train doing the switching and as to the definition of what constitutes switching.

Similarly the compensation varies from pay for actual minutes to pay for a minimum of one hour or one day, or the classification of the train may be changed under the following rule :

> All trains loading or unloading freight or doing switching shall be classed as locals. This will not apply to trains making less than six stops to take in or set out cars, requiring less than 11 switches at the five or less stops, exclusive of the necessary switching on account of placing air brake cars for use to handle train, or, when necessary freight may be unloaded at not more than three of the stops. Trains consuming 30 minutes or more icing beef shall be classed as locals (*Boston & Maine Railroad, Engineers Schedule, Rule 1, Sec. 1 Art. 4*).

Another illustration of rules of this character is as follows :

> Miles or Minutes will be allowed for doubling hills, going for water outside the water limits, or for coal, on a single trip or a combination of single trips, when the actual mileage, including the extra mileage exceeds one hundred miles (Rule 8, Erie engineers' schedules).

Under this type of rules payments are made for icing and weighing cars, loading and unloading stock and work of similar character performed at or between terminals.

## Turnabound Trips.

The general rule for Conductors and Trainmen in the Eastern Territory is as follows:

> Crews in pool or irregular freight service may be assigned to make short trips and turn-arounds with the understanding that one or more turn-around trips may be started out of the same terminal and paid actual miles with a minimum of 100 miles for a day, provided that the mileage of all the trips does not exceed 100 miles, and further provided that crews will not be started out of terminals under this rule after having been on duty ten consecutive hours *(Boston & Maine, Schedule, Rule 38 * * * Page 18).*

In the Southeastern Territory, the following rule is quite common:

> In through freight or mixed service a straightaway run is a run from one terminal to another terminal, and not less than one hundred miles will be allowed for each run.
>
> In through freight or mixed train service, except as may be otherwise specified herein, a turn-around run is a run from a terminal to an intermediate point and return to the starting terminal, and not less than 100 miles will be allowed for each run. Two or more turn-around runs between the same points in continuous service may be required at mileage rates and overtime with a minimum of one hundred miles where the distance one way is less than thirty miles, provided the second or any succeeding run shall be started within nine hours and five minutes from the time the crew was ordered to report for the first run, and provided further that when the actual miles run equal or exceed 100 miles the starting of an additional run shall be regarded as commencing a new day. Time of trains on such runs will be continuous from the time crew reports for duty at the initial point for first run until relieved

upon completion of the last run. A second or succeeding turn-around may be made to and return from point between the turn-around point of the first run and the starting terminal *(Art. II., Sec. 2, Louisville & Nashville Railroad Schedule).*

In the Western Territory, there is a variety of practices though largely based on principles illustrated above but specific details vary in almost as many particulars as there are individual roads.

Specific provisions in engineers and firemen's schedules covering this class of service are less common but in all territories, more or less of the schedules contain such rules.

## LIST OF SCHEDULES SUMMARIZED.

References to pages, articles, rules, etc., in the foregoing summaries are to the following schedules. In many cases certain provisions of the schedules proper are modified by subsequent supplements which are attached thereto.

### Alabama and Vicksburg.

| | Title of schedules. |
|---|---|
| For conductors and brakemen— | Rates of pay and other regulations concerning conductors, trainmen and yardmen. (Revised April 10, 1913.) |
| For engineers— | Rates of pay and other regulations concerning locomotive engineers. (Effective Oct. 7 and Dec. 16, 1911.) |
| For firemen— | Rates of pay, rules and regulations for locomotive firemen. (Effective Sept. 7, and Sept. 16, 1911.) |

### Atchison, Topeka and Santa Fe (East and West).

| | |
|---|---|
| For conductors and brakemen— | Schedules of rates, rules and regulations for trainmen. (Effective Sept. 29, 1910.) |

### Atchison, Topeka and Santa Fe (Coast Lines).

| | |
|---|---|
| For conductors and brakemen— | Schedules of rates, rules and regulations for conductors, brakemen and baggagemen. (Effective April 1, 1907.) |

ATLANTA, BIRMINGHAM & ATLANTIC.

| | |
|---|---|
| For conductors— | Rules and rates of pay applicable to conductors. (Effective Nov. 1, 1912.) |
| For brakemen— | Rules and rates of pay applicable to baggagemen, flagmen, white brakemen, yard conductors and white switchmen. (Effective March 1, 1914.) |
| For engineers— | Rules and schedules of pay for engineers. (Effective Jan. 1, 1912.) |

ATLANTIC COAST LINE.

| | |
|---|---|
| For conductors— | Revised schedules for wages, rules and regulations for conductors.) (Effective Oct. 1, 1912.) |
| For brakemen— | Revised schedule of wages, rules and regulations for trainmen and yardmen. (Effective Oct. 1, 1912.) |
| For engineeers— | Revised agreement between the engineers and the company. (Effective Dec. 1, 1911. |

BOSTON & MAINE.

| | |
|---|---|
| For conductors— | Rules and rates of pay applicable to men in train and yard service. (Effective Oct. 1, 1913.) |
| For engineers— | Rules and rates of pay applicable to engineers. (Effective May 1st, 1912, and Nov. 1st, 1913.) |
| For firemen— | Rules and rates of pay applicable to firemen and hostlers. (In effect May 3, 1913, and Nov. 21, 1914.) |

CENTRAL OF GEORGIA.

| | |
|---|---|
| For conductors and brakemen— | Schedule of wages and rules and regulation, conductors, trainmen and yardmen. (Effective Oct. 1, 1912.) |
| For engineers— | Schedules of wages and rules and regulations governing Brotherhood and Locomotive Engineers. (Effective Nov. 1, 1911 and Sept. 15, 1911.) |

CHARLESTON AND WESTERN-CAROLINA.

| | |
|---|---|
| For conductors— | Schedule of wages for conductors. (Effective Oct. 1, 1912.) |
| For brakemen— | Schedule of wages of baggage-masters, flagmen, brakemen, yard conductors and switchmen. (Effective Nov. 1, 1913.) |
| For engineers— | Revised agreement between the engineers and the company. (Effective Jan. 1, 1912.) |

CHESAPEAKE & OHIO.

| | |
|---|---|
| For conductors— | Schedule of wages and general regulations for conductors. (Effective Sept. 1, 1912, and April 1, 1913.) |
| For brakemen— | Schedule of wages and general regulations for trainmen and yardmen. (Effective Sept. 1, 1913.) |
| For engineers— | Schedule of wages and general regulations for engineers. (Effective March 1, 1912.) |
| For firemen— | Schedule of wages and general regulations for firemen and hostlers. (Effective May 3rd, 1913, and Sept. 1, 1913.) |

### Chicago, Burlington and Quincy.

| | |
|---|---|
| For conductors and brakemen— | Rules and rates of pay for trainmen. (Effective Sept. 1913, and March 1, 1914.) |
| For engineers— | Rules and rates of pay for locomotive engineers. (Effective May 11, 1915.) |
| For firemen— | Rules and rates of pay for locomotive firemen. (Effective May 11, 1915.) |

### Chicago, Milwaukee & St. Paul.

| | |
|---|---|
| For conductors and brakemen— | Schedule of wages and regulations for the government of trainmen. (Revised Dec. 28, 1910.) |
| For engineers— | Schedule for engineers. (Revised Dec. 28, 1915.) |
| For firemen— | Schedule for firemen. (Revised Dec. 28, 1915.) |

### Delaware, Lackawanna & Western.

| | |
|---|---|
| For conductors and brakemen— | Rules and rates of pay for conductors and trainmen. (Effective Oct. 1, 1913.) |
| For engineers— | Rules and rates of pay for engineers. (Effective Nov. 17, 1913.) |
| For firemen— | Rules and rates of pay for firemen. (Effective Oct. 28, 1913.) |

### Denver & Rio Grande.

| | |
|---|---|
| For conductors— | Rates of pay and regulations for conductors and trainmen. (Effective April 1, 1911.) |

## El Paso & Southwestern.

| | |
|---|---|
| For conductors and brakemen— | Schedule of pay and regulations for conductors and brakemen. (Reprint March 11, 1912.) |
| For engineers— | Schedule of pay and regulations for locomotive engineers. (Effective March 1, 1906.) |
| For firemen— | Schedule of pay and regulations for locomotive firemen. (Effective June 1, 1912.) |

## Erie.

| | |
|---|---|
| For conductors and brakemen— | Rates of pay and rules for conductors, trainmen and yardmen. (Effective July 1, 1914.) |
| For engineers— | Rates of pay and rules for engineers. (Effective April 10, 1913.) |
| For firemen— | Rates of pay and rules for firemen. (Effective January 8, 1913.) |

## Florida East Coast.

| | |
|---|---|
| For conductors and brakemen— | Revised schedule of wages, rules and regulations for trainmen and yardmen. (Effective July 1, 1913.) |
| For engineers— | Memorandum of agreement made and entered into by and between the Florida East Coast Railway Co. and members of the brotherhood and other locomotive engineers running thereto (Effective January 1, 1916.) |

GEORGIA RAILROAD.

| | |
|---|---|
| For conductors and brakemen— | Pay scale and regulations—Amendments to schedule effective Aug. 1, 1910, for conductors, baggagemen and flagmen. (Effective Jan. 1, 1913.) |
| For engineers and firemen— | Schedule of wages for engineers, hostlers and white fireman, and rules relating thereto. (Effective June 1, 1914.) |

GEORGIA SOUTHERN AND FLORIDA.

| | |
|---|---|
| For conductors and brakemen— | Schedule of wages and rules and regulations, conductors, trainmen and yardmen. (Effective Oct. 1, 1912.) |
| For engineers— | Schedule of pay and rules for the government of locomotive engineers. (Effective July 1, 1914.) |
| For firemen— | Schedule of pay and rules for the government of locomotive firemen. (Effective June 1, 1912.) |

GEORGIA AND FLORIDA.

| | |
|---|---|
| For conductors and brakemen— | Schedule of wages, rules and regulations of conductors and trainmen. (Effective Dec. 1, 1914.) |
| For engineers and firemen— | Schedule of wages, rules and regulations for engineers and firemen. (Effective March 1, 1914.) |

GULF AND SHIP ISLAND.

| | |
|---|---|
| For conductors and brakemen— | Rules, regulations and rates of pay for conductors, trainmen and yardmen. (Effective June 20, 1916.) |
| For engineers— | Agreement between the Gulf and Ship Island Railroad Company and its locomotive engineers. (Effective April 1, 1915.) |

GULF, COLORADO & SANTA FE.

For conductors and brakemen— Agreement between the Gulf, Colorado and Santa Fe Railway Company and its conductors and brakemen.
(Effective Jan. 1, 1913.)

GALVESTON, HARRISBURG & SAN ANTONIO.

(See Note).

HOUSTON & TEXAS CENTRAL.

See Note).

HOUSTON EAST & WEST TEXAS.

(See Note).

ILLINOIS CENTRAL.

For engineers— Schedule of wages of locomotive engineers.
(Effective May 1, 1915.)

For firemen— Schedule of wages of locomotive firemen.
(Amended May 11, 1915.)

INTERNATIONAL & GREAT NORTHERN.

For conductors and trainmen— Agreement between the International & Great Northern Railway Company and the Order of Railway Conductors and the Brotherhood of Railroad Trainmen.
(Effective Dec. 15, 1911.)

For engineers and firemen— Agreement between the International & Great Northern Railway Company and the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen.
(Effective Aug. 1, 1915.)

LOUISVILLE & NASHVILLE.

| | |
|---|---|
| For conductors and brakemen— | Agreement between the Louisville & Nashville Railroad Company and its conductors, brakemen, flagmen and baggagemen. (Effective Mar. 1, 1916.) |
| For engineers and firemen— | Agreement between the Louisville & Nashville Railroad Company and its locomotive engineers and firemen. (Effective Feb. 1, 1916.) |

MISSOURI, OKLAHOMA & GULF.

(See Note.)

NEW ORLEANS GREAT NORTHERN.

| | |
|---|---|
| For conductors— | Schedule of wages of conductors. (Effective Oct. 1, 1912.) |
| For engineers— | Schedule of pay and regulations governing locomotive engineers. (Effective July 1, 1913.) |
| For firemen— | Schedule of pay and regulations governing locomotive firemen. (Effective July 1, 1913.) |

NEW ORLEANS AND NORTHEASTERN.

| | |
|---|---|
| For conductors and brakemen— | Rates of pay and other regulations concerning conductors, trainmen and yardmen. (Revised April 1, 1913.) |
| For engineers— | Rates of pay and other regulations concerning locomotive engineers. (Effective Dec. 7 and Dec. 16, 1911.) |
| For firemen— | Rates of pay, rules and regulations for locomotive firemen. (Effective Dec. 7 and Dec. 16, 1911.) |

NEW YORK, NEW HAVEN AND HARTFORD.

| | |
|---|---|
| For conductors and trainmen— | Schedule with conductors, trainmen and yardmen. (Effective Oct. 1, 1913.) |
| For engineers— | Schedule and agreement with engineers. (In effect May 14, 1910.) |
| For firemen— | Schedule and agreement with locomotive firemen. (In effect May 3, 1913, and Feb. 1, 1914.) |

NORFOLK & WESTERN.

| | |
|---|---|
| For conductors and brakemen— | Rates of pay and regulations for conductors, brakemen, baggagemen and yardmen. (Effective Sept. 1, 1912.) |
| For engineers— | Rates of pay and regulations for locomotive engineers. (Effective Dec. 1, 1911.) |
| For firemen— | Rates of pay and regulations for firemen. (Effective Oct. 1, 1912.) |

NORFOLK SOUTHERN.

| | |
|---|---|
| For conductors— | Schedule of rates, rules and regulations for conductors. (Effective Jan. 1, 1916.) |
| For brakemen— | Rates, rules and regulations for trainmen. (Effective Jan. 1, 1916.) |
| For engineers— | Revised schedule of rates, rules and regulations for engineers. (Effective Jan. 1, 1916.) |

NORTHERN PACIFIC.

| | |
|---|---|
| For conductors— | Schedule for conductors. (Effective Jan. 1, 1915.) |
| For brakemen— | Schedule for trainmen and yardmen. (Effective June 1, 1915.) |
| For engineers— | Schedule for engineers. (Effective January 1, 1916.) |
| For firemen— | Schedule for firemen. (Effective Jan. 1, 1916.) |

PENNSYLVANIA.

| | |
|---|---|
| For conductors and brakemen— | Regulations and rates of pay for the governing of trainmen in road and yard service. (Effective Aug. 1, 1910). |
| For engineers— | Rates of pay and regulations governing engineers in road and yard service. (Effective May 1, 1912). |
| For firemen— | Regulations and rates of pay for the government of firemen in road and yard service. (Revised Feb. 8, 1915). |

PITTSBURG & LAKE ERIE.

| | |
|---|---|
| For conductors and brakemen— | Rules and rates of pay for conductors, trainmen and yardmen. (Effective May 1, 1915). |
| For engineers— | Rules and rates of pay for engineers. (Effective March 17, 1913). |
| For firemen— | Rules and rates of pay for locomotive firemen. (Effective May 1, 1913). |

RICHMOND, FREDERICKSBURG AND POTOMAC.

| | |
|---|---|
| For conductors and brakemen— | Rules and rates of pay for conductors, baggagemen, flagmen, brakemen and yardmen. (Effective Dec. 1, 1913.) |
| For engineers— | Rules and rates of pay for locomotive engineers. (Effective Jan. 1, 1913.) |
| For firemen— | Rules and rates of pay for locomotive firemen. (Effective March 1, 1913.) |

ST. LOUIS, BROWNSVILLE AND MEXICO.

| | |
|---|---|
| For conductors— | Agreement between the St. Louis, Brownsville and Mexico Railway Company and the Order of Railway Conductors. (Effective Aug. 1, 1911.) |
| For engineers and firemen | Agreement between the St. Louis, Brownsville and Mexico Railway Company and the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen Enginemen. (Effective Aug. 1, 1911.) |

SEABOARD AIR LINE.

| | |
|---|---|
| For conductors and and brakemen— | Schedule of rates, rules and regulations for conductors, trainmen and yardmen. (Effective Oct. 1, 1912). |
| For engineers— | Schedule of rates, rules and regulations for engineers. (Effective April 15, 1913). |

SOUTHERN PACIFIC. PACIFIC SYSTEM.

| | |
|---|---|
| For conductors and brakemen— | Schedule of pay and regulations for trainmen and yardmen. (Effective April 1 and Oct. 1, 1907). |

SOUTHERN RAILWAY.

| | |
|---|---|
| For conductors and brakemen— | Schedule of wages and rules and regulations — conductors, trainmen and yardmen. (Effective Oct. 1, 1912). |
| For engineers and firemen— | Schedule of wages and rules and regulations for engineers, firemen and hostlers. (Effective April 1, 1914). |

VICKSBURG, SHREVEPORT & PACIFIC.

| | |
|---|---|
| For conductors and brakemen— | Rates of pay and other regulations concerning conductors, trainmen and yardmen. (Revised April, 10, 1913.) |
| For engineers— | Rates of pay and other regulations concerning locomotive engineers. (Effective Dec. 7 and Dec. 16, 1911.) |
| For firemen— | Rates of pay, rules and regulations for locomotive firemen. (Effective Dec. 7 and Dec. 16, 1911.) |

NOTE: The summaries of the rates and methods of pay for

Galveston, Harrisonburg & San Antonio,
Houston & Texas Central,
Houston East and West Texas, and
Missouri, Oklahoma & Gulf

have been prepared from allegations in the respective bills of complaint or extracts from the schedules attached thereto.

Office Supreme Court, U. S.
FILED
JAN 8 1917
JAMES D. MAHER
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

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## No. 797.

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FRANCIS M. WILSON, UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF MISSOURI, APPELLANT,

*vs.*

ALEXANDER NEW AND HENRY C. FERRIS, AS RECEIVERS OF THE MISSOURI, OKLAHOMA & GULF RAILWAY COMPANY, APPELLEES.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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## SUPPLEMENTAL BRIEF.

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JOHN G. JOHNSON,
ARTHUR MILLER,
WALKER D. HINES,
*Counsel for Appellees.*

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## SUPPLEMENTAL BRIEF.

**Supplemental Brief for Appellees, Commenting upon Brief for the United States and upon the "Summary of Appellant's Arguments," by Frank Hagerman, Esq.**

### I.

Mr. Hagerman says the carriers could at once have brought a test case, had here on the first of October, 1916, Term, and then advanced, argued, and actually decided before January

1, 1917. This observation apparently has no relevancy to the constitutional questions arising here. But it is wholly without warrant. Concerted action on the part of the carriers could not have been had in such short time. It would have been impossible, in the orderly conduct of so complicated a problem, to have had the necessary study as to the meaning of the statute, its applicability to actual conditions, and its constitutionality, dealt with by conference of the counsel and operating officers, in such a manner as to give all railroad companies entitled to be heard an opportunity to present their views; then to have the matter passed upon finally by the executives; and then to have bills of complaint formulated and filed, so as to get the case in the Supreme Court on the first day of the October, 1916, Term, or substantially sooner than it was gotten there.

Mr. Hagerman's statements that the carriers preferred to take their chances with the election, and thereafter banded together for a common cause, and concluded not to obey the Adamson Act and concluded not to make an effort for any speedy test, are not sustained by anything in the record, and are in every respect, in form and in substance and in their implications, contrary to the facts.

The institution of separate suits by the separate carriers was an appropriate means of establishing a proper basis for the protection of their rights. On the same day the Government brought about the institution of this proceeding at Kansas City, counsel for the railways, without knowledge of that proceeding, called on the Attorney General and sought his co-operation in arranging for a speedy test.

## II.

Quotations are made from the statements of Messrs. Lovett, Sheean, and Thom at the hearing before the Senate Committee, and the effort is made to show that thereby (1) they promised not to test the constitutionality of the Adamson Act, and (2) they conceded that it was workable.

1. As to the suggested promise not to test the constitutionality of the act: The Adamson Act was not before the Senate Committee. The bill was not introduced even in the House until August 31st, the date of the Senate Committee hearing, presumably while the Senate Committee was in session. The Adamson Bill was not passed, even in the House, until September 1st, the day after the Senate Committee hearing. The Senate Committee was considering the President's program as a whole, as indicated by the introductory remarks of Chairman Newlands (Senate Document 549, p. 23). The remarks of Messrs. Lovett, Sheean, and Thom were directed to the President's program as a whole, and they vigorously protested against the adoption merely of the part of the program acceptable to the Brotherhood.

The bill before the Senate Committee which purported to establish the "eight-hour standard work day" was "Tentative Committee Print No. 1," set out in full in the report of the hearing (Senate Document 549, p. 5). So far as Messrs. Lovett, Sheean, and Thom were speaking of that particular branch of the President's program as illustrated by any proposed bill, they were speaking with reference to this Tentative Committee Print No. 1, which provided (section 2) for the transmission of the report of the "eight-hour day commission" to the Interstate Commerce Commission "which *shall* consider an increase of *freight rates* to meet such additional expenditures by the railroads affected *as may have been rendered necessary by the adoption of the eight-hour day,* and which have not been offset by administrative readjustments and economies, should the facts disclosed justify the increase." (Italics ours.)

This provision was vital, and completely differentiated the proposition as it was before the Senate Committee from the Adamson Act, which contains no provision whatever for the reimbursement of the railroad companies.

But beyond all this, no expressions by the three gentlemen mentioned could give Congress a power which it does not

possess, and those expressions were not intended to, and could not, bind the owners of the railroads to comply with a void statute, at heavy expense, without provision for reimbursement.

2. As to the suggested assent by Messrs. Lovett, Sheean, and Thom, to the view that the Adamson Act is workable: We shall point out below that in view of the haste with which this legislation was passed no one had an opportunity to consider deliberately the complicated subject of workability. Moreover, Judge Lovett indicated (Senate Document 549, p. 73) that he was not sure that he understood the technique of the eight-hour day; Mr. Thom, in reply to a question as to which railroads could afford to pay the increased wages, said he did not know, and stated: "I have been on the outskirts of this whole business" (Sen. Doc. 549, p. 105); and Mr. Sheean stated that, except as to the general thought that if the President's program was to be adopted it should be adopted as a whole, "I have given no consideration to this bill," and "I have not attempted to analyze specially the provisions of the bill" (Sen. Doc. 549, p. 98); but he did state also: "This eight-hour day they have not upon a single road in the form here proposed in the United States" (Sen. Doc. 549, p. 97); and he also pointed out that not even in the Southeast was there any schedule providing for all train crews "an eight-hour day or 12½-mile speed basis" (Sen. Doc. 549, p. 94).

Since legislation upon compensation of railroad employees is a novelty, without practical or legislative or judicial constructions to serve as guides in construing it, no offhand opinions, as to workability, would have been valuable if they had been expressed; but they were not expressed.

A reference to the facts shows that nobody had had any opportunity for adequate deliberation on that matter until after the Senate hearing.

The President's message was delivered to Congress on

August 29th. The Senate hearing was held on August 31st. No bill on the subject was introduced in the House until August 31st. No bill was introduced in the Senate until September 1st. But a tentative draft of bill was presented on the morning of August 31st, at the opening of the Senate hearing, to those attending that hearing. Therefore, any assumptions made by any gentleman at that hearing as to the meaning of the tentative bill that day presented, or as to its workability, could not have been based upon adequate deliberation. In fact, except so far as concerned the general principles involved in the demands of the employees, and in the general idea of attempting to grant some of those demands by legislation, along with provision for reimbursing the railroads for the money thus taken from them, there was no opportunity at all for the expression of considered views.

These conditions were recognized by the members of the Senate Committee. In opening the hearing, Senator Newlands said:

> "As to the hurried character of the proceeding I have to say that it arises from the fact that a general strike has been ordered by the railroad brotherhoods to take place September 4. The time, therefore, for legislation is so limited as to preclude the deliberation essential to such important legislation. Though time is pressing, the Committee on Interstate Commerce has deemed it unwise to embark on legislation until after a hearing of the parties interested—the brotherhoods, the carriers, and the shipping and consuming public. They regret that the time is so limited, and they trust that before the conclusion of the hearing the officials at the head of the brotherhoods, realizing that Congress is about to enter with serious and continuous purpose upon the most important questions affecting their interests, will, by a postponement of the strike, enable Congress to act with the care, deliberation, and temperance which the importance of the questions involved demands" (Chairman Newlands, p. 23).

Mr. A. B. Garretson, on behalf of the brotherhoods, said:

> "The danger lies largely in this: The time at disposal for the purpose precludes that calm deliberation that should be brought to the settlement of the question. We are by no means insensible to this, but we, like many men before us, and possibly like our associates on the other side of the question, are in the grip of a power greater than we" (A. B. Garretson, p. 25).
>
> "As to the question of authority, for myself I could call off the strike. I can only call it off in one way, and that is by showing to the men that a satisfactory settlement has been effected. I care not through what agency that settlement comes" (A. B. Garretson, p. 30).

Chairman Newlands further said:

> "I desire to state also that a resolution was offered yesterday in the Senate and is now before the committee, introduced by Mr. Lee of Maryland, as follows:
>
> "*Resolved*, That in order to afford sufficient time for the intelligent consideration of the legislation suggested in the President's message to Congress of August twenty-ninth, the Senate of the United States hereby requests the representatives of the railway employees who have fixed upon September fourth for the commencement of a general strike, to postpone the date of the beginning of such strike for one week, and that a copy of this resolution be immediately forwarded by the Secretary of the Senate to said representatives having the matter of the strike in their charge.
>
> "The committee will be glad to hear from the brotherhoods, when it suits their convenience, upon this resolution. I understand it has been brought to their attention for the first time now" (p. 36).

Mr. Garretson, on behalf of the brotherhoods, requested (p. 37) that he be allowed to answer the inquiry in the latter part of his statement; and in the latter part of his statement (p. 154) proceeded to give his answer "why a refusal has been made to put off the time for this strike."

Senator Lewis said:

> "Mr. Gompers, I should like to ask your opinion upon a matter that is agitating me considerably: We, the law-making body of this country, have assumed to act upon this subject, all without partisanship or prejudice, seeking to bring about its solution. Having just entered upon it, it is evident that we could not have had the time sufficient to investigate the subject or to become acquainted with its details and clearly, from your objections, to become advised what might be obstructions to some of the methods we have entered upon. Do you see any injury to the cause if there should be a delay in this strike sufficient to give time and opportunity to the legislators to investigate this question now impartially themselves with a view to reaching a solution that might avoid the strike and result in justice to all?" (p. 61).

Mr. Gompers made a lengthy answer, the conclusion of which was that any postponement of the strike would make it, if not wholly, at least partially, ineffective (p. 62).

Mr. W. G. Lee, one of the brotherhood chiefs, said:

> "But first and above all of these bills or proposed bills, as I understand them, one I hope can be enacted before the close of Saturday's work day. If so, then we can stop this calamity by wiring to all of our general chairmen the message 'Satisfactory settlement effected,' and explain afterwards that it is just about what the President offered; that it is just about what he suggested, the eight-hour day, an investigation of the other things, and put them in if they are found to be fair or dispose of them in a fair and equitable way as Congress may say, or some one else. We are ready to do that, gentlemen, and all criticisms to the contrary should be forgotten.
>
> "But I want to impress upon you how absolutely impossible it is for us to send word to those chairmen that a satisfactory settlement has been made until first the eight-hour basis is established" (pp. 65-66).

Senator Pomerene said:

> "This order was issued some days ago and before the President brought this matter to the attention of Congress. Up to that time it was not expected that Congress would have a hand in the adjustment of these differences. Now, since your strike order was issued, this matter has been called to the attention of Congress, and I think I can say that every Senator and every Congressman is desirous of aiding in the adjustment of these differences. Do you not think that in view of the fact that this time controversy has arisen here, that now Congress is seeking to aid in securing a remedy, that that would change the situation so far as your men are concerned so that a little delay might be granted in order that Congress could look into this matter carefully and not act hastily or unwisely" (p. 67).

Mr. W. G. Lee responded (p. 67) to the effect that while a large majority of the employees might be willing to grant such a request, it was not possible to reach them in the short time.

Senator Pomerene then continued:

> "I think you are convinced of the fact that the Congress has taken hold of this matter with a view to trying to adjust it or to seek some remedy. Now, then, that being so, I am sure it occurs to you and to your associates that it would take a little time for Congress to formulate this legislation in a way that will satisfy the different minds of the different members of Congress, and would not that fact have weight with the members of your brotherhood?" (p. 67).

Mr. Lee replied:

> "All of that is perfectly recognized by me; but, again I will say, after the 11 days' wait with the President and after our mediation and negotiation at New York and after being, in substance, released here, we felt there was nothing in the world to do,

> because we were receiving wires, affidavits, and letters from our members by the hundreds that the companies were preparing at many, many, of these places for a strike" (p. 67).

It is not an unnatural consequence, when legislation is pressed and adopted under such stress as this, that when opportunity comes for the calm deliberation which was admittedly lacking when the legislation was framed and adopted, it may be found that the statute as it stands fails to accomplish what, in the hurried and inadequate consideration of the bill, it may have been supposed to accomplish.

The suggestion is made that the claim of unworkability is an "after-thought." This extraordinary situation is one where, before the passage of the act, there was admittedly no time for adequate "thoughts" of any character, except, possibly, upon the broadest matters of principle, so that all detailed thoughts as to what the act, as passed, meant, and as to whether it could be applied in practice, had to be "after-thoughts" when there could be time for that "calm deliberation," which nobody pretends existed prior to the passage of the act.

Much of what is said in support of the workability of the statute completely begs the question because it assumes that the statute means the same as the proposition of the employees, with time and a half for overtime omitted. When it is said that representatives of the railroad companies could estimate the amount of the loss, it must be remembered that these estimates were made in advance of any thought of the Adamson Act and were exclusively on the proposition of the employees. The bill of complaint in this case, and our main brief, show how radically different this proposition of the employees was from the Adamson Act as it stands. Evidently, all that was said by representatives of the railroads before the Senate Committee, as to the possible effect of legislation, was based on the theory of legislation conforming to the demands of the employees.

## III.

But, even if the legislation had been in the same form as the proposition of the employees, a serious question would have arisen as to whether or not it was fatally defective, because it is obvious that the proposition of the employees could not be put into actual effect without supplemental agreements on matters which would have been settled in principle by the acceptance of that proposition, but which would not have been settled in detail cases. These difficulties would have been enormously enhanced if Congress had passed an act in the form of the employees' proposition and had applied it (as the Adamson Act applies), to passenger road service, to which the demand of the employees does not apply.

The suggestion is made that Judge Hook, who presided in the lower court, must have presumed that the Act was workable, because he required Appellees to keep a separate account of the moneys which would be due the employees under the act, if held valid. This suggestion hardly comports with the other suggestion, strenuously urged by opposing counsel, that Judge Hook decided the case hurriedly "without any investigation," upon mere impressions.

The suggestion that the stipulation signed by counsel for the railways generally implies that the act is workable is negatived by the language of the stipulation. That stipulation merely provides that all books be kept in such manner that "if the constitutionality of the act is upheld, it" (the railroad company) "shall ascertain the amount due to the employees affected *under the construction placed upon the Act by this court.*" It will be observed that the stipulation did not bind the railroad companies to keep books and accounts showing what would be due employees under the Adamson Act, and the reason was that it was impossible to tell what would be due until it should be ascertained whether

the act was sufficiently definite in a constitutional sense, and, if so, what it meant.

The suggestion is made that whenever an award has been made by arbitrators "it has been almost in the verbiage of the Adamson Act." We deny that this is the case in any award as to employes in *train service*, to which alone the Adamson Act relates. The Adamson Act is not understood to relate to telegraphers, since they are not actually engaged in operating trains, nor, for the same reason, to switchmen or to hostlers. Telegraphers, switchmen, and hostlers are perhaps generally on an absolute time basis, without any reference to mileage. We are not therefore concerned with the language of awards relating to these employes. But awards relating to employes engaged in train service are never "almost in the verbiage of the Adamson Act." It needs only to contrast any such award with the Adamson Act to see the wide differences between them and to see how much has to be added to the Adamson Act in order to make it mean the same as any award which has been made for employees in train service.

A sufficient illustration of this is afforded by the award "*In re* Railroads in Western Territory and Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen 1914-1915" (Senate Document 493), pertinent portions of which read as follows:

"IT IS AWARDED: ARTICLE I.

"Basis of Day and Overtime.

"Passenger Service.

"The minimum passenger rate for engineers shall be $4.30, and for firemen $2.50, one hundred (100) miles, or less, six (6) hours and forty (40) minutes, or less, shall constitute a minimum day's work in all classes of passenger service except as otherwise specified herein; miles made in excess of one hundred (100) pro rata.

"On short turn around runs no single trip of which exceeds eighty (80) miles, including suburban service, overtime shall be paid for all time actually on duty or held for duty in excess of eight (8) hours (computed on each run from the time required to report for duty to end of that run) within twelve (12) consecutive hours; and also for all time in excess of twelve (12) consecutive hours computed continuously from the time first required to report to final release at end of last run. Time shall be counted as continuous service in all cases where the interval of release from duty at any point does not exceed one hour.

"All other passenger overtime shall be computed on the basis of fifteen (15) miles per hour from the time required to report for duty until released, and separately for each part of a round-trip run.

"All passenger overtime will be paid for at the rate of seventy-five (75) cents per hour for engineers and forty-five (45) cents for firemen, and will be computed on the minute basis.

"When employes of any road elect to retain their present overtime basis, no part of this Article is to be used in computing or paying passenger overtime.

"Freight Service.

"The minimum freight rate for engineers and firemen shall be according to class of locomotive, as provided in Article II, for ten (10) hours, or less, or one hundred (100) miles, or less; miles made in excess of one hundred (100) pro rata.

"Overtime in freight service is to be computed on the basis of ten (10) miles per hour, and paid pro rata on the minute basis.

"General.

"Road engineers and firemen required to perform a combination of more than one class of road service during the same trip will be paid at the rate and according to the rules governing each class of service for the time or miles engaged in each, but will be paid for the entire trip not less than a minimum day at the

highest rate applying for any class of service performed during such trip.

"Where two or more engines of different weights on drivers are used during a trip or day's work, the highest rate applicable to any engine used should be paid for the entire day or trip" (pp. 6, 8).

*"General Regulations.*

"In awarding the above rates, rules and conditions it is understood that the engineers or firemen on any railroad may elect to take any daily rate, rule, or condition as herein awarded, but the Board denies right of the men to take a part or whole of any rule herein awarded and couple it with a part or whole of any rule in the present schedule and thereby create a new condition not contemplated by the award.

"Nothing herein is to be construed to deprive the engineers or firemen on any railroad from retaining their present rules and accepting any daily rate that may be awarded, or retain their present daily rate. and accept any awarded rule. It is further understood that the foregoing does not in any manner conflict with or nullify any part of Article 12 of the Arbitration Agreement, which reads as follows:

> " 'That any rate of pay, including excess mileage or arbitrary differentials, that are higher, or any rules or conditions of employment contained in individual schedules in effect October 10, 1913, that are more favorable to the employees than the award of said Board, shall not be modified or affected by said award' " (pp. 23, 24).

## IV.

Reference is made to the statement of Mr. Elisha Lee, of railroads having services that vary from "100 miles or less, or 10 hours or less" per day (Sen. Doc., 549, p. 154). That statement did not mean that railroads not mentioned in that schedule all had a basis of 100 miles or less, 10 hours or

less, *and no other,* even in freight service. If the statement be construed to mean that, then it must give way to the schedules themselves, which are before the court by stipulation, and therefore occupy a better position than Mr. Lee's statement which is not before the court by stipulation. Of course, in any conflict as to the facts of a schedule, the schedule itself must prevail. These schedules are lodged with the clerk of the court and are summarized in Appendix A (separate volume) to Appellees' brief.

The Pennsylvania Railroad, for example, is not included in Mr. Lee's list, and yet a substantial part of its service, other than passenger, is *not* on a basis of 100 miles or less, 10 hours or less. (See Appendix A, pp. 9 to 12, showing, for example, over 700 classes of runs for engineers "at specified rates for the trip, without reference to any general mileage rate or any general overtime basis.")

But Mr. Lee's statement itself emphasizes the very uncertainties which make the statute fatally defective. Take as an example the Atlantic Coast Line. His statement shows "branch lines, overtime after 12 hours." The Atlantic Coast Line schedules, which are before the court by stipulation, show there are 34 such branch lines, as to conductors and brakemen, and 30 such branch lines, as to engineers; that the rates are not per 100 miles, but are special or fixed rates per day, with overtime after 12 hours (Appendix A, pp. 32, 33).

Mr. Lee's statement shows such departures as to every southeastern railroad, and as to some of the few western railroads in his list. Notable instances are the Louisville & Nashville and the Denver & Rio Grande, whose schedules are before the court by stipulation. (See Appendix A, pp. 34, 29).

See Appendix A at large for repeated illustrations of substantial service not on a basis of 100 miles or less, and varying widely from a 10-mile speed basis or a 10-hour equivalent for the mileage unit.

## V.

Mr. Hagerman makes some irrelevant suggestions as follows: That the refusal of the employees to arbitrate was due to the insistence of the railroads that counter demands must be arbitrated; this is negatived by the statement of the United States Board of Mediation that the employees stated to the board that they "would not arbitrate their own demands even if the contingent demands of the railroads were withdrawn" (see Mr. Sheean's Statement, Sen. Doc., 549, p. 97).

That the railroads were not even willing to be bound by the kind of investigation they proposed to the President; this is negatived by that proposal (Sen. Doc. 549, p. 41).

That the Appellees in their bill concealed the fact that the railroads made a counter demand and asked that it be arbitrated; this is negatived by the bill itself, which alleges that "the railway companies submitted a counter proposition demanding a revision of the existing arrangement in several respects, and proposed that the matters in dispute be submitted to arbitration." (Transcript, p. 6.) The bill also attached as an exhibit the President's message, to which Mr. Hagerman refers to show that the bill concealed the facts.

## VI.

The effort to show inadequacy of existing wages of railroad train service employees defeats itself. The figures of the Interstate Commerce Commission show very high pay per hour rather than the contrary. If wages as high as these, averaging 59.3 cents per hour for freight engineers, and 49.4 cents per hour for freight conductors, can be increased at will by Congress, no vestige of managerial discretion is left to the owners of the railroads relative to wages.

Another controlling fact is that the train service employees have the most powerful labor organizations in the world, so

it is absurd to suggest any thought of oppression of those employees through unduly low wages.

The references to the higher pay of bricklayers, carpenters, etc., in some of the largest cities of the country throw no light on the subject. (1) These occupations are generally seasonal, and in any event rarely approach in regularity or permanency the train service occupations. (2) They do not offer a career with anything like the promotions afforded in train service; the brakeman has the prospect of becoming a freight conductor and eventually a passenger conductor on a preferred run; the fireman has the prospect of becoming a freight engineer and eventually a passenger engineer on a preferred run. (3) Wages paid in large cities in these other occupations cannot be compared with average train service wages, paid largely to employees living in much smaller places with much more favorable living conditions; (4) There is no claim of any abandonment of train service employment for these alleged more attractive employments.

## VII.

References to hazards of railroad service call for no analysis here. They have no substantial relation to this wage measure. These hazards would probably be increased if there was an effort to speed up the trains, but Congress has not declared that there ought to be any such speeding up.

References to accidents when employees are on duty beyond the 16 hours allowed by the Hours of Service Act are of course irrelevant here.

## VIII.

The Government briefs assume that the Adamson Act applies to "terminal" service, *i. e.*, to switching and hostling service. We do not understand that this is the case.

The act applies only to employees "actually engaged in

any capacity in the operation of *trains*," etc. Hostlers merely attending to locomotives which are not operating trains, and switchmen merely switching cars which are not being operated in trains, are not in the Act. If there are cases where switchmen do operate trains, they may be included in respect of those operations. (See United States *vs.* Erie R. R. Co., 237 U. S., 402, 59 Sup. Ct. Rep., L. Ed., 1019.)

## IX.

The suggestion that the *pro rata* pay for overtime is a "mild" penalty to bring about as near an approximation to an eight-hour day as conditions will permit is without force. Any such "approximation" is not a legal standard. *Pro rata* pay for overtime is not a penalty, mild or otherwise. It is merely compensation for work performed and value received. The pay for the 9th hour or the 16th hour is no more a penalty than the pay for the first hour. There is no more "penalty" in working an employee sixteen hours and paying him two days' pay than there is in working two employees eight hours each and paying the two of them together two days' pay.

Respectfully submitted,

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WASHINGTON, D. C., January 8, 1917.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1916.

FRANCIS M. WILSON, United States Attorney for the Western District of Missouri,
*Appellant,*
*vs.*
ALEXANDER NEW and HENRY C. FERRIS, as Receivers of the MISSOURI, OKLAHOMA & GULF RAILWAY COMPANY,
*Appellees.*

No. 797.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

## APPELLEES' REPLY TO SUPPLEMENTAL MEMORANDUM FOR APPELLANT

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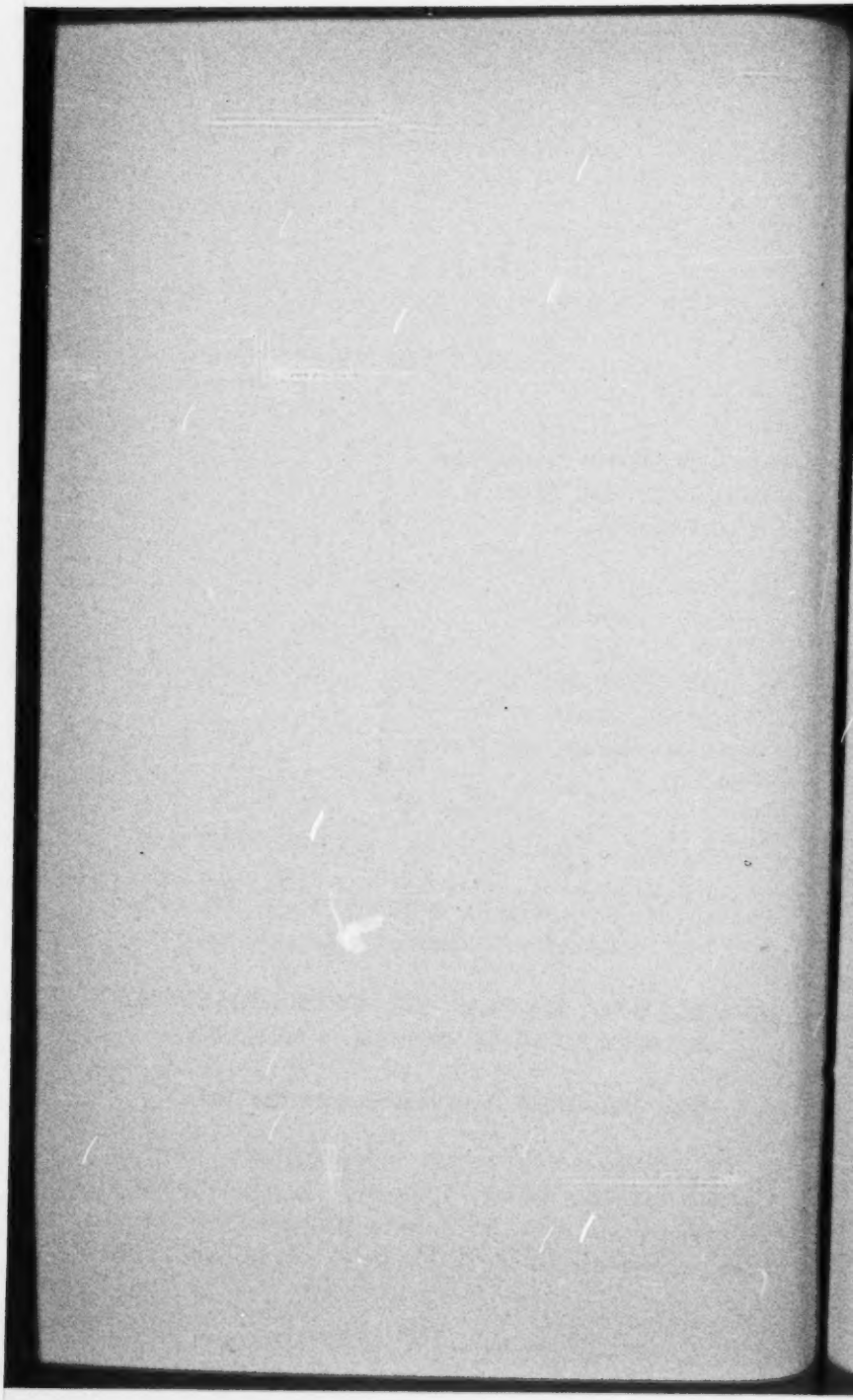

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

| | |
|---|---|
| FRANCIS M. WILSON, United States Attorney for the Western District of Missouri, Appellant, vs. ALEXANDER NEW and HENRY C. FERRIS, as receivers of the Missouri, Oklahoma & Gulf Railway Company, Appellees. | No. 797. |

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

## APPELLEES' REPLY TO SUPPLEMENTAL MEMORANDUM FOR APPELLANT.

### The Practical Application of the Act.

The expression "day's work" is not generally found in the wage schedules at all. Frequently, in schedules where the payment is made per 100 miles or per some other unit of miles, expressions similar to the following may be used: "100

miles or less shall constitute a day"; or (in order, for example, to express a ten mile speed basis) "100 miles or less, 10 hours or less, shall constitute a day". Neither the "100 miles" nor the "10 hours" is used to describe the actual day's work and the schedules contemplate that the actual day's work may be substantially in excess of 100 miles or 10 hours.

Nor does the phrase "100 miles or less, 10 hours or less" in such a schedule indicate the period after which the right to overtime payment begins. The phrase is used to express the idea that overtime shall be paid if the trip is not made at an average speed of 10 miles per hour. As a matter of fact, upon a trip, say, of 130 miles, overtime under such a schedule does not begin until the end of 13 hours. Paragraph *(e)* of Article I. of the demand of the Brotherhoods (Appellees' brief, p. 33), clearly expressed the idea that on trips of over 100 miles overtime would not begin at the end of eight hours, but "when the time on duty exceeds the miles run divided by 12½ miles per hour."

If the endorsement proposed in appellant's supplemental memorandum should be placed on the schedules, it would create difficulties instead of solving them. The endorsement itself is ambiguous. If it means that overtime shall be computed after eight hours, it runs counter to the general theory of all schedules which provide for payment according to a unit of 100 miles. If, however, it be construed to mean overtime only after the total trip has consumed more time than would have been required at 12½ miles per hour, then the endorsement would work as to schedules where the unit of pay is 100 miles, and a definite speed basis is established, but it would fail to work, except in a strikingly arbitrary manner which Congress could not have intended, in a very large class of important cases.

This is true because of the existence of two well defined and essentially different methods of reckoning com-

pensation, with one of which the construction fits and with the other of which it does not fit. One of these methods is the reckoning of compensation by the 100 miles. But there is a second method of reckoning compensation by the trip as a whole, and this method is in use to such a substantial extent that it cannot be disregarded. Illustrations of the latter are very numerous on the Pennsylvania Railroad, Pittsburg and Lake Erie, Denver and Rio Grande and Louisville and Nashville, where a great many important classes of runs are paid for by the trip and not per 100 miles, and in branch line service in the Southeast where the service is paid for as a whole and not per 100 miles and where overtime is paid after 11 or 12 hours; and similar illustrations are found to a substantial extent in other parts of the country.

It is assumed that as to the first method of reckoning compensation, appellant's endorsement would mean that eight hours would be the equivalent of the 100 miles which is treated as the "day" for purposes of reckoning compensation; so that the result would be the production of a speed basis of $12\frac{1}{2}$ miles per hour and on a trip of 130 miles overtime would not begin until after $10\frac{4}{10}$ hours. If the endorsement does not mean this, it must be meaningless because the only "day" in the schedule is the 100 mile unit or standard.

But as to the second method of reckoning compensation, there is nothing in the schedule to which appellant's endorsement could apply. In such a case there is no "day" at all in the sense of a unit or standard, because the trip as a whole is its own and exclusive standard.

In such cases the endorsement would then mean either that the trip as a whole is the "day," or it would be unworkable without the establishment of a rate per 100 miles or per some other unit where none has ever been established. If the endorsement in such cases would apply to the trip as a whole as "the day" the endorsement would operate in a most arbitrary way:

A conductor may be paid $5.25 in a lump sum for a trip of 130 miles with overtime after 13 hours without any reference to a basic rate per 100 miles. The time for making that trip of 130 miles would, according to this construction, be changed from 13 hours to 8 hours, producing a speed basis of 16¼ miles per hour. At the same time another conductor on the same road, or on an adjacent road, may be paid substantially the same for a trip of the same length but his compensation may be reckoned according to a rate say of $4 per 100 miles with overtime after 10 hours, *i. e.*, on a ten-mile speed basis, and in that event the indorsement produces a speed basis of only 12½ miles an hour.

If it be said that the statute does not preclude the company from abandoning its pay per trip, and reconstructing its schedules on the basis of pay per 100 miles, then it must be equally true that the company has the right to abandon its pay per 100 miles and reconstruct its pay on any other basis, provided only that eight hours shall be the equivalent of whatever unit may be adopted. For example, the "day" might be reduced to 80 miles and the rate of pay (after the period covered by section 3) reduced accordingly, so that the ten-mile speed basis would remain. This makes the legal effect of the statute futile and emphasizes its lack of relation to any imaginable constitutional object; and also emphasizes the extent of the disruption of existing contract relations.

But appellant's proposal must also be applied to Section 3, and when applied to Section 3 its arbitrary results are even more striking. If a conductor happens to be paid for a run of 130 miles on the basis, say, of $4 per 100 miles with overtime after 10 hours, the result is that he gets overtime of 40 cents per hour for any additional time required for the trip in excess of what would have been required at 10 miles per hour. Section 3, according to the appellant's proposed construction by implication, will operate to give the conductor $4 for the first eight hours and 50 cents per hour for each additional hour. In

other words, the effect of the construction by implication sought by appellant is to increase the conductor's wages 25 per cent. But if the conductor happens to be paid, say, $5.20 for the trip of 130 miles as a whole, with overtime after 13 hours at, say, 40 cents per hour, the result of appellant's proposed construction by implication appears to be that this conductor will get $5.20 for the first eight hours and overtime at 65 cents per hour for all time thereafter, *making an increase of 62½ per cent. in his wages.*

Again, in the cases so frequent in the Southeast where on branch lines overtime is paid after 12 hours, the result of this proposed construction by implication appears to be to increase wages on branch lines by 50 per cent., and at the same time, if on the particular railroad employees in through freight service are paid per 100 miles on a 12½ mile speed basis, there will be no increase at all in the wages of the latter employees, and yet, as explained by Mr. Elisha Lee (Senate Document 549, pp. 85, 92), the men in through freight service in the Southeast, working on the 12½ speed basis, work as long hours as other train employees on account of the fact that the operating divisions for through freight service in the Southeast are much longer than the average for the country.

Unless this extremely arbitrary effect be given to appellant's proposal, then that proposal supplies no standard whatever under section 3 as to a very substantial part of the train-supervision of the country.

It is submitted that the court is not justified in giving by implication a construction to the Act which produces such extremely arbitrary results. Appellant seeks this construction by implication in order to avoid the arbitrary and aimless disruption of contracts which would come from a literal construction. Yet his proposed construction by implication itself produces a result probably more arbitrary and aimless. It is better for the Act to stand or fall according to its own declarations, than to attempt to write in additional words and thereby give the Act an obviously arbitrary character.

The appellant's supplemental memorandum states that as to passenger engineers and conductors, the employee is laboring at a task which can be and usually is accomplished in less than eight hours. If this statement means that each 100 miles in passenger service is usually accomplished in less than eight hours, it is correct. But if the statement means that passenger trips as a whole are accomplished in eight hours, it is by no means correct, for a substantial part of passenger service requires more than eight hours because the passenger runs are frequently long. The bill of complaint alleges "and that consequently" (it is believed "consequently" is a misprint for 'frequently'), "in passenger train service considerably more than eight hours are required to make the trip" (Transcript, p. 5).

It is a serious question as to what would be the effect of the endorsement proposed by the appellant on the "8 hour-12 hour rule" which is very widely used in "short turn-around passenger service" in the East (See Appendix A to Appellees' Brief, p. 9). Certainly it cannot be the intention of the statute to make a 50 per cent. increase in the wages of passenger trainmen in such cases, where the time actually on duty does not exceed eight hours, although the "elapsed time" may be 12 hours; and yet the endorsement is so ambiguous as to be open to the construction that such is its effect.

## Comment upon Additional Suggestion as to Regulation.

There is no basis for the effort to differentiate the regulation of wages from the regulation of prices. The amount to be paid for cross-ties, for example, is "as much a continuing and daily factor" as the amount to be paid for wages, because the replacing of decayed cross-ties with new ones is a continuing process. The producer of the cross-tie is as "animate" as the employee of the carrier.

The amount of wages and the price of cross-ties both have their principal significance, in this connection, not in their bearing upon labor which *has been* performed or upon cross-ties which *have been* delivered, but in their bearing upon labor *to be* performed, or cross-ties *to be* delivered. If Congress has the power to increase wages so as to increase the contentment of the employees, and their capacity to produce good service, it has equally the power to increase the price to be paid for cross-ties, so as to increase the tendency toward production and delivery of proper cross-ties. Certainly a dividing line between the existence of a power to fix wages and the non-existence of a power to fix the price of cross-ties cannot rest upon the distinction suggested by appellant.

It is denied that "the size of the pay envelope" has more bearing on commerce than the rules governing an employee's right to recover. The direct and natural tendency of a statute prescribing liability is to produce more care on the part of the employer and therefore to conduce to safety of transportation. The relation of the amount of wage to the amount of care which will be used by the employee is wholly speculative. If Congress has power to increase wages (especially when there is no reasonable basis for a contention that any evil of abnormally low wages, impairing the physical well being of employees, exists), on the ground that still higher wages may produce an increase in contentment, and that the greater contentment may produce an increase in care, then the theory of "real or substantial relationship" ceases to have meaning and the doctrine that a managerial discretion is still protected by the Fifth Amendment ceases to exist.

January 1917.

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